

United States  
Circuit Court of Appeals

For the Ninth Circuit.

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KEMP-BOOTH COMPANY, LIMITED,  
a Corporation,

Appellant,

vs.

J. M. GALVIN, as Trustee in Bankruptcy of the  
House of Irving, a corporation, bankrupt,  
Appellee.

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Transcript of Record

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Upon Appeal from the United States District Court  
for the Western District of Washington,  
Northern Division.

FILED

MAR - 4 1935



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

MESSRS. RIDDELL & BRACKETT,

Solicitors for Appellant,  
1121 Smith Tower,  
Seattle, Washington.

MR. EARL G. RICE,

Solicitor for Appellee,  
1012 Lowman, Bldg.,  
Seattle, Washington.

MESSRS. McCLURE & McCLURE,

Solicitors for Appellee,  
905 Lowman Bldg.,  
Seattle, Washington. [1\*]

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\*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

In Equity. No. 939.

J. M. GALVIN, as Trustee in Bankruptcy of the  
House of Irving, a corporation, Bankrupt,  
Plaintiff,

vs.

KEMP-BOOTH COMPANY, LIMITED,  
a Corporation,  
Defendant.

### BILL OF COMPLAINT.

To the Honorable Judges of the United States  
District Court for the Western District of  
Washington:

J. M. Galvin, a resident of King County in the  
Western District of Washington, and a citizen of  
the state of Washington, brings this, his bill of  
complaint, against Kemp-Booth Company, Limited,  
a corporation, and complains as follows:

#### I.

This is a suit in equity brought by the plaintiff  
as Trustee in Bankruptcy of House of Irving, a  
corporation, under and by virtue of the provisions  
of the Bankruptcy Act of 1898 and amendments  
thereof, to recover a preference under Section 60-b  
of the Act.

## II.

At all the times herein mentioned House of Irving was and is a Washington corporation, and defendant was and is a Washington corporation with its principal place of business in Seattle in King County.

## III.

On April 11, 1932, House of Irving, a corporation, was [2] adjudicated bankrupt by order that day duly entered in bankruptcy cause No. 32348 by the United States District Court for the Western District of Washington, sitting at Seattle, on involuntary bankruptcy petition filed March 25, 1932, by creditors against House of Irving. On May 2, 1932, plaintiff was duly appointed Trustee of the bankrupt and ever since has been and now is such Trustee, duly qualified and acting.

## IV.

Within four months prior to March 25, 1932, and while the bankrupt was insolvent, and was indebted to the defendant and to other creditors of the same class on unsecured debts provable in bankruptcy, the bankrupt paid to the defendant in money the sum of \$800.00, and assigned and transferred to the defendant certain accounts receivable of the approximate value of \$2694.25, the same being part of the bankrupt's property; the defendant has ever since retained the same in its possession and under its control and has collected money on said accounts and is continuing to collect moneys

thereon from the respective debtors of the bankrupt whose accounts were so assigned; the amounts collected by the defendant are not definitely known to the plaintiff, but defendant is fully informed as to the same.

Also within the time and under the conditions hereinbefore mentioned the bankrupt made a further transfer of portions of its property to the defendant by delivery to the defendant during the months of January and February, 1932, of certain merchandise consisting of woolen suitings of the approximate value of \$3500.00, the particular description of which are not now definitely known to the plaintiff, but the defendant has full knowledge thereof; and the defendant, ever since then, has exercised dominion over said merchandise, asserted title thereto [3] and sold part of the same.

#### V.

That each and every of said payments of money, assignments of accounts receivable and transfer and delivery of merchandise was made by the bankrupt to be applied and was by the defendant applied upon the defendant's claim against the bankrupt, which was thereby paid in full. That the effect of such cash payments and transfers by the bankrupt to the defendant was and is an appropriation of the assets of the bankrupt and a depletion of the insolvent fund, and was made so as to enable the defendant to obtain a greater percentage of its debt than any other creditor of the bankrupt of the same class as the defendant, and such transfers were and are each

a preference under the Bankruptcy Act of 1898 and the amendments thereto.

VI.

Defendant received such payments and transfers, knowing, or having reasonable cause to believe, that said bankrupt was insolvent and that it was receiving a preference under the Bankruptcy Act and the Laws of the state of Washington.

VII.

Plaintiff has insufficient assets in his hands to pay in full the indebtedness of the bankrupt, nor any more than approximately 10% of the amount of the claims of the general creditors, which aggregate about \$17,000.00.

VIII.

Heretofore and prior to the commencement of this action plaintiff duly demanded of defendant the restitution and return to the estate in bankruptcy of the money and property preferentially transferred as above alleged, but the same has been refused. [4]

WHEREFORE plaintiff prays:

1. That the payments and transfers above mentioned be decreed by this court to be each preferential and in violation of the Bankruptcy Act of 1898 and the amendments thereto; that the same be set aside and be declared to be wholly void as against the plaintiff.

2. That the defendant be ordered to account for and to pay to the plaintiff the aggregate of all sums received from the bankrupt in money as well as all sums received by the defendant for collection of the accounts receivable above mentioned with interest thereon from date of defendant's receipt of same.

3. That the defendant be ordered to transfer to the plaintiff all of said assigned accounts receivable remaining in defendant's possession and under its control which have not been paid in full by the respective debtors.

4. That the defendant be ordered to account for and re-deliver to the plaintiff all of the merchandise remaining in its possession and under its control received from the bankrupt as above alleged, and as to such of the merchandise as may have been disposed of by the defendant that the plaintiff have judgment against the defendant for the value thereof.

5. That the plaintiff have such other and further relief as may be proper.

6. And may it please this Honorable Court to issue its subpoena directed to the defendant commanding it on a day certain to appear and answer this bill of complaint and to abide by the orders and decrees of the court thereon.

EARL G. RICE and

McCLURE & McCLURE,

Solicitors for Plaintiff,

1012 Lowman Building,

Seattle, Washington. [5]

State of Washington,  
County of King—ss:

J. M. GALVIN, having been duly sworn, on oath states: He is the plaintiff above named. He has read the foregoing Bill of Complaint, knows the contents thereof and believes the same to be true.

J. M. GALVIN.

SUBSCRIBED and sworn to before me this 5th day of July, 1932.

[Seal]

CARL G. RICE,

Notary Public in and for the State of Washington,  
residing at Seattle.

[Endorsed]: Filed July 8, 1932. [6]

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[Title of Court and Cause.]

ANSWER.

Comes now Kemp-Booth Company Limited, a corporation, and answering plaintiff's complaint herein, admits, denies and alleges as follows:

I.

Defendant admits the allegations set forth in paragraphs I, II and III of plaintiff's complaint.

II.

Answering paragraph IV. defendant admits that within four months prior to March 25, 1932, and while bankrupt was indebted to the defendant, the

bankrupt paid to defendant in money the sum of \$200.00 and in addition thereto did pay to the defendant the further sum of \$100.00, for which a present consideration was paid, towit, \$100.00 as an advance for the payment by bankrupt on account of a trade acceptance.

Defendant further admits that during said period, the bankrupt did assign and transfer to defendant certain accounts receivable of the approximate value of \$2694.25, but denies that the said accounts were the property of the bankrupt or formed a part of his estate; admits that the defendant has ever since retained the said accounts and has collected and [7] is still collecting on the same.

Defendant further admits that during said period the bankrupt did deliver to defendant during the months of January and February, 1932, certain merchandise consisting of woolen suitings, a list of the same being approximately as set forth in plaintiff's bill of particulars herein. Defendant further alleges that at no time has the monetary value of said suitings ever been figured or invoiced to said bankrupt and defendant cannot obtain an accurate statement or appraisal of said amount without figuring the same. That the said woolen suitings were delivered to bankrupt and return delivery thereon taken, all pursuant to agreements as hereinafter set forth. Defendant denies each and every other allegation in said paragraph IV. contained.



III.

Answering paragraph V. defendant admits that the payment of \$200.00 hereinbefore referred to was applied by said defendant on bankrupt's open account and denies each and every other allegation therein contained, except as hereinafter admitted or modified.

IV.

Answering paragraph VI. defendant denies the allegations therein contained.

V.

Answering paragraph VII. defendant has not sufficient information to admit or deny same and therefore denies the same upon information and belief.

VI.

Answering paragraph VIII. defendant admits the allegations therein contained. [8]

Further answering and by way of a first affirmative defense, defendant alleges as follows:

I.

That on or about the 25th day of November, 1931, the bankrupt was compelled to make payment by his bank of a certain trade acceptance in the amount of \$100.00 and did apply to defendant to advance the same temporarily. That the said sum was advanced upon the agreement and in the consideration then and there given that said bankrupt would give his check in an equal amount, said check to be hon-

ored within the next few days; that thereafter the said check was so honored and defendant did receive the said \$100.00.

Further answering and by way of a second affirmative defense, defendant alleges as follows:

### I.

That defendant and bankrupt did for many months prior to the bankruptcy herein have a written agreement that certain goods would be by the defendant delivered to and placed with the bankrupt upon consignment; that it was the practice and custom that said goods would be placed with said bankrupt upon a consignment memorandum showing the number and yardage of said goods. No price was figured at said time and no invoice of said goods rendered. That the title to said property did under said agreement at all times remain in the defendant until such time as the particular piece of goods was actually paid for, even though the same had been made up into a suit.

Pursuant to said agreement, defendant had placed with said bankrupt a large quantity of woolen suiting materials; that said materials were, pursuant to said agreement, made up into suits. That in January and February of 1932, a check of [9] bankrupt's stock was made and it was ascertained that certain designated patterns had been made into suits pursuant to said consignment agreement. It was then and there agreed by the defendant and said bankrupt that the assignment of accounts in the approxi-

mate amount of \$2694.25, all of which were accounts arising from the use of materials consigned by defendant to bankrupt, would be made to the defendant in consideration of the said woolen suitings so used and the release by defendant of its lien and rights to certain other accounts arising from the use of materials consigned to the bankrupt; that said accounts were so accepted by said defendant in full and complete payment of said suitings so consigned and the release of certain other accounts.

\* \* \* \* \*

Further answering and by way of a third affirmative defense, defendant alleges as follows:

I.

Defendant repeats and makes a part hereof the first two paragraphs of paragraph I. of the second affirmative defense herein.

II.

That pursuant to said agreement and custom, the said defendant did during various times place with the said bankrupt a large quantity of woolen suiting material of different numbers and yardage. That said goods were consigned to said bankrupt, title to the same remaining in defendant and at no time passing to said bankrupt. No invoice of said goods was ever rendered to said bankrupt. That during January and February, 1932, defendant desiring the return of all consigned merchandise, did demand the return thereof from said bankrupt. The woolen suiting material then on hand under consignment

corres- [10] ponded approximately with the list as set forth in plaintiff's bill of particulars. That upon demand by said defendant, the bankrupt did return said materials to the defendant. That no part of said materials was a part of bankrupt's estate or should be accounted for therein.

WHEREFORE, having fully answered, defendant prays that the plaintiff's complaint be dismissed with prejudice and that defendant be awarded his costs herein.

RIDDELL, BRACKETT & FOWLER,  
Attorneys for Defendant.

State of Washington,  
County of King—ss:

J. H. GARRETT, being first duly sworn, on oath deposes and says: That he is the Secretary & Treasurer of the defendant corporation and as such makes this verification; that he has read the foregoing Answer, knows the contents thereof and believes the statements therein made to be true.

J. H. GARRETT.

Subscribed and sworn to before me this 25th day of October, A. D. 1932.

CORA L. WATSON,  
Notary Public in and for the State of Washington,  
residing at Seattle.

[Endorsed]: Filed Oct. 31, 1932. [11]

[Title of Court and Cause.]

MEMORANDUM DECISION AFTER TRIAL.

EARL G. RICE, 1012 Lowman Building, Seattle, Wash., and McClure & McClure, 905 Lowman Building, Seattle, Wash. Attorneys for Plaintiff, Riddell & Brackett, 1121 Smith Tower, Seattle, Wash., Attorneys for Defendant.

This is a suit by the Trustee, under Sec. 60 of the Bankruptcy Act (Title 11, U. S. C. A., Sec. 96) to recover on account of an alleged preference.

On April 11, 1932, the House of Irving, a tailor, was adjudged a bankrupt, upon petition of creditors filed March 25, 1932.

Recovery is asked on account of money paid defendant by bankrupt and on account of money collected upon accounts receivable assigned to defendant, and on account of certain merchandise, consisting of woolen suitings delivered to it by bankrupt.

The defendant, while not admitting the amounts and values alleged, does admit that within four months prior to March 25, 1932, while bankrupt was indebted to the defendant, payments by the bank- [12] rupt were made the defendant; that accounts receivable were assigned to it, which it has retained, collected and is still collecting; that merchandise consisting of woolen suitings were delivered by the bankrupt to defendant.

It is, however, contended by the defendant that the woolens had been delivered by the defendant to

the House of Irving upon consignment; that title had never passed to bankrupt; that defendant was entitled to retake possession of its merchandise and receive payments on accounts arising from the sale by bankrupt of the consigned merchandise.

The written contract between the defendant and bankrupt, entered into in July, 1930, was as follows:

“MEMORANDUM AGREEMENT

THIS MEMORANDUM AGREEMENT made and entered into on this 26th day of July, 1930, by and between KEMP-BOOTH COMPANY, LIMITED, a corporation, party of the first part, and HOUSE OF IRVING, a corporation, party of the second part, both of Seattle, Washington, WITNESSETH:

FIRST: The party of the first part agrees during the life of this agreement to consign from time to time such of its goods to the party of the second part as are suitable for sale for the party of the first part by the party of the second part.

SECOND: The value of the said goods that shall be in the possession of the party of the second part shall at no time exceed the sum of Three Thousand (\$3,000.00) dollars.

THIRD: The party of the second part shall receive such commission for selling the same as may be stipulated by the party of the first part.

FOURTH: The party of the second part shall account to, and settle with, the party of the

first part on the first day of [13] each and every month during the life of this agreement at the sale price fixed by the party of the first part for all merchandise covered by this agreement sold during the previous month, less commission; and the party of the second part hereby guarantees to the party of the first part the collection and payment promptly on the first day of each month of the sale price of all merchandise sold during the previous month.

FIFTH: The party of the second part shall furnish to the party of the first part on the first day of each and every month, beginning September 1, 1930, an inventory of the exact merchandise held by it for the party of the first part.

SIXTH: The party of the second part shall keep all of the said merchandise in its possession covered with fire and burglary insurance in policies running to the party of the first part, and shall keep the said merchandise segregated from other merchandise on the premises.

SEVENTH: Either party to this agreement may terminate the same by giving to the other three days' written notice of its intention to terminate the same, and at the termination thereof all goods in possession of the party of the second part belonging to the party of the first part shall be returned to the party of the first part.

EIGHTH: The party of the first part shall have the right to check up and inspect and/or to withdraw any part or all of said merchandise at any time without notice to the party of the second part.

NINTH: It is distinctly understood and agreed that the title to all such merchandise as may be consigned to the party of the second part by the party of the first part shall remain in the party of the first part, and that the party of the second part [14] have no title thereto whatsoever, but have the right to sell the same for the party of the first part under the terms and conditions stated. The prices and terms on which the same may be sold are to be furnished from time to time by the party of the first part.

TENTH: The party of the second part shall have the right, until otherwise directed in writing by the party of the first part, to make up any part or parts of said merchandise into garments, but in such case the title to all such garments shall remain in the party of the first part; and on the sale of any and all such garments the party of the second part shall receive and retain for their services and expenses in making up such garments such part of the selling price as shall exceed the sale price of the consigned merchandise used therein, as well as the usual commission on such merchandise.\*

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals

(\*Emphasis supplied by the Court)



the day and year in this certificate first above written.

KEMP-BOOTH COMPANY LIMITED

Witnesses:

Kathryn A. Schmitz as to

By J. H. Garrett, Secretary,

Party of the First Part.

HOUSE OF IRVING

Wm. A. Hail as to

By J. H. Irving, President,

Party of the Second Part

J. H. Irving.''

The foregoing contract was never filed with the County Auditor (as a conditional sales contract) as provided by Sec. 3790, Remington's Revised Statutes of Washington (since amended by Washington Laws of 1933, page 465, Sec. 1, Remington's Revised [15] Statutes of Washington, Annual Pocket Part, Sec. 3790) nor as a chattel mortgage as provided by Sec. 3781, nor recorded as required by Sec. 3788.

PLAINTIFF cites: Meacham on Sales, Sec. 43; *Sturm v. Boker*, 150 U. S. 312, 329, 37 E. Ed. 1093, 1100; *Ludvigh v. American Woolen Co. of N. Y.* 31 ABR 481, 231 U. S. 522; *Gem Electric Co. v. Brower*, 34 ABR 642, 221 Fed. 597, (9th CCA); *Miller Rubber Co. v. Citizens etc. Bank*, 37 ABR 542, 233 Fed. 488 (9th C. C. C.); *In re King*, 45 ABR 95, 262 Fed. 318 (9th C. C. A.); *In re Wells*, 140 Fed 752; *In re*

National Home and Hotel Supply Co., 226 Fed. 840, 844; 35 A. B. R. 139; In re Eichengreen, 18 Fed. (2d) 101, 104; Reliance Shoe Co. v. Manly, 25 Fed. (2d) 381, 383; In re Wanskaser, 30 Fed. (2d) 510, 515; In re Moore, 11 Fed. (2d) 62; Globe Bank v. Martin, 236 U. S. 288, 35 S. Ct. 377, 29 L. Ed. 583; Ex parte White, L. R. 6, Chan. App. 397; Meacham on Sales, Sec. 46, In re Penny & Anderson, 176 Fed. 141; In re Garcewich, 115 Fed. 87; Peoria Manuf'g Co. v. Lyons, 38 NE 661; Rem. Comp. Statutes, Sec. 3790; Buffum v. Dexter, 96 NW 352; Peek v. Heim, 17 Atl. 984; Thompson v. Paret, 94 Pa. St. 275; Laffin and Rand Powder Company v. Burkhardt, 97 US 110, 116, 24 L. Ed. 973; In Potter v. Mt. Vernon Roller Mill Co., 101 Mo. A. 581, 584, 73 SW 1005; Buffum v. Merry, 3 Mason 478, 4 Fed. Cas. 604; Austin v. Seligman, 18 Fed. 519; Chisholm v. Eagle Ore Sampling Co., 144 Fed. 670; Jenkins v. Eichelberger, 4 Watts 121, 28 Am. Dec. 691; Morton v. Woodruff, 2 NY 154; Foster v. Pelhome, 7 NY 433; Ewing v. French, 1 Blackford's Rep. 353; Slaughter v. Green, 1 Randolph 3, 10 Amer. Dec. 488; Chase v. Washburn, 1 Ohio St. Rep. 244; Pierce v. Schenck, 3 Hill 28; Mallony v. Willis, NY 76; Seymore v. Brown, 19 John 44; [16] In re Lee, 3 NY 152; Mitchell Wagon Co. v. Poole, 235 Fed. 817; Taylor v. Fram, 252 Fed. 465; In re Leflys, 229 Fed. 675, 36 ABR 306; Chickering v. Boskess, 22 NE 542; In re Babenau, 118 Fed. 47; Newmark on Sales, Sec. 23; Weston v. Brown, 53 NE 36; In re Martin—Vernau

Music Co. v. 132 Fed. 983, 984; In re U. S. Electrical Supply Co., 2 Fed. (2d) 378; In re Agnew, 178 Fed. 478, 481, 23 ABR 360; In re Highgrade Electrical Store, 3 Am BR (NS) 78; Miller Rubber Co. v. Citizens Trust, 37 ABR 542; In re Newerf's Estate, 233 Fed. 488, 147 CCA 374; In re Pierce, 157 Fed. 757; Flanders Motor Co. v. Reed, 220 Fed. 642, 33 ABR 842; John Deere Plow Co. v. McDavid, 177 Fed. 802; Franklin v. Stoughton Wagon Co., 168 Fed. 857; In re King, 262 Fed. 318; Gen. Elec. Co. v. Brower, 221 Fed. 597; In re Shiffert, 281 Fed. 285; Schultz as trustee v. Wesco Oil Co., 149 Wash. 21; In re Wells, 140 Fed. 752; Taylor v. Fram, 252 Fed. 465; Granite Roofing Co. v. Casler, 46 NW 728; Buffum v. Descher, 96 NW 352; In re Lenforth, Fed. Case. 8369; In re Roellech, 223 Fed. 687, 35 ABR 164; Rasmussen case, 136 Fed. 704; In re Carpenter, 125 Fed. 831; In re Zephyr Merc. Co., 203 Fed. 576; United States v. General Electric Co., 15 Fed. (2d) 715; Yarm v. Lieberman, 46 Fed. (2d) 464, 466; Williston, Contracts, Vol. II, Sec. 621, pages 1203 and 1024, In re Eighth Ave. 82 Wash. 398, 402, 144 Pac. 533; Arbuckle v. Kirkpatrick, 98 Tenn. 221, 39 SW 3, 36 LRA 285; Samson Tire & Rubber Co. v. Eggleston, 45 Fed. (2d) 502, 504; Eilers Music House v. Fairbanks, 80 Wash. 379; Inland Finance Co. v. Inland Motor Car Co., 125 Wash. 301; Lloyd v. McCallum Donahue Co. 127 Wash. 180; Bauer v. Commercial Credit Co., 163 Wash. 210; Renfro-Wadenstein, 47 Fed. (2d) 283 and 53 Fed. (2d) 834; Wright Dana Hardware Co.,

211 Fed. 908; *Williams v. Plattner*, 46 Fed. (2d) 476, 17 ABR 227; *In re Niels Ohr Hein*, Bankrupt, 60 Fed. (2d) 966, 19 ABR (NS) 546; 1933 Cumulative [17] Supplement to *Collier on Bankruptcy*, 13th Edition, pages 418 et seq; *Digest of American Bankruptcy Reports*, Sec. 509.

DEFENDANT cites: *Sturm v. Boker*, 150 U. S. 312, 37 L. Ed. 1093; *Ludvigh, Trustee in Bankruptcy, v. American Woolen Company*, 231 U. S. 522, 56 St. Ct. 345; *Eilers Music House v. Fairbanks*, 80 Wash. 379; *Inland Finance Co. v. Inland Motor Car Co.*, 125 Wash. 301; *Lloyd v. MacCallum-Donahoe Co.* 127 Wash. 180; *Bauer v. Commercial Credit Co.*, 163 Wash. 210; *In re Renfro-Wadenstein*, 47 Fed. (2d) 238 and 53 Fed. (2d) 834; *In re Wright Dana Hardware Company*, 211 Fed. 908; *Simpson v. Western Hardware Company*, 227 Fed. 304; *Mitchell Wagon Co. v. Poole*, 235 Fed. 817; *In re Galt*, 120 Fed. 64; *Franklin v. Stoughton Wagon Co.* 168 Fed. 857; *In re Smith & Nixon Piano Co.*, 149 Fed. 111; *In re King*, 262 Fed. 318; *In re Thomas*, 231 Fed. 513; *Bransford v. Regal Shoe Co.*, 237 Fed. 67; *In re National Home & Hotel Supply*, 226 Fed. 840, 847; *In re Weisl*, 300 Fed. 635, 640; *McElwain-Barton Shoe Co. v. Bassett*, 231 Fed. 889; *Bartling Tire Co. v. Coxe*, 288 Fed. 314; *Thomas v. Field-Brundage Co.*, 215 Fed. 891; *Collier on Bankruptcy*, 13th Ed., 1291; *Reber v. Shulman*, 179 Fed. 574; 24 ABR 782 and 183 Fed.

564, 25 ABR. 475; Dugan v. Crabtree, 299 Fed. 115, 3 ABR (NS) 47.

CUSHMAN, District Judge:

With the Tenth provision in this contract the transaction was one of sale and not consignment. *Buffum v. Merry*, 3 Mason 478, Fed. Case No. 2,112, opinion by Judge Story; *Commissioner of Internal Revenue v. San Carlos Milling Co.*, 63 Fed. (2d) 153-154 (9th CCA); *Borman v. United States*, 262 Fed. 26-34; *Baltimore & Ohio R. Co., vs. Western Union Telegraph Co.*, 241 Fed. 162-170. [18]

In view of the foregoing, it is not necessary to determine other of the questions which have been argued.

The Trustee is entitled to recover the money paid the defendant by bankrupt, other than the \$100.00, as an advance for the payment by bankrupt on account of a trade acceptance. As to this particular item there was a present consideration.

The Trustee is also entitled to the return of the uncollected accounts receivable, together with the amounts which the defendant has collected upon the accounts, and, at his election, the return of all merchandise remaining in defendant's possession or the value thereof at the time the same was taken by the defendant from the bankrupt. Concerning the amounts and values, should the parties be unable to agree, they will be further heard upon the settlement of the findings of fact, conclusions of law and judgment, all of which will be settled upon notice.

The Clerk is directed to notify the attorneys for the parties of the filing of this decision.

[Endorsed]: Filed Apr. 7, 1934. [19]

[Title of Court and Cause.]

FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW

The above entitled cause having come on regularly for trial before the court, the Honorable Edward E. Cushman, District Judge, presiding, and a jury being waived, on November 21, 1933; the plaintiff being present and represented by Earl G. Rice and Wm. E. McClure, his counsel; the defendant being represented by James H. Garrett, its secretary, and by Charles F. Riddell, its counsel; and witnesses having been sworn and examined on the issues of fact raised by plaintiff's bill of complaint in equity and the defendant's answer thereto, and having been continued from time to time until December 4, 1933, at which time the Court, having heard the arguments of counsel, and considered the testimony and the evidence, took the case under advisement with privilege reserved to counsel for the parties to file briefs, and thereafter said briefs having been filed; the Court on April 7, 1934, having filed and entered his memorandum decision herein and ordered Findings; now, therefore, the Court, in conjunction with the Findings of Fact and Conclusions of Law embodied in the memorandum decision filed herein April 7, 1934, makes the following: [20]

FINDINGS OF FACT

I.

That J. M. Galvin, the plaintiff, is a resident of King County, in the Western District of Washing-

ton, and a citizen of the State of Washington, and at all times herein mentioned was and now is trustee in bankruptcy of House of Irving under the provisions of the Bankruptcy Act of 1898 and amendments thereof; and this bill of complaint in equity is brought to recover a preference under Sec. 60-b of the Act.

## II.

That at all times herein mentioned House of Irving was and is a Washington corporation; and the defendant, Kemp-Booth Company Limited, was and is a Washington corporation with its principal place of business in Seattle, King County, Washington.

## III.

That on April 11, 1932, the House of Irving, a corporation, was adjudged bankrupt by order that day duly entered in Bankruptcy cause No. 32348 by the United States District Court for the Western District of Washington, Northern Division, sitting at Seattle, on involuntary bankruptcy petition filed March 25, 1932, by creditors against House of Irving; on May 2, 1932, plaintiff was duly appointed trustee of the bankrupt, and ever since and now is such trustee, duly qualified and acting.

## IV.

That on July 26, 1930, and for a long time prior thereto, and at all times subsequent thereto, the said corporation, House of Irving was, has been and is insolvent, and for more than four months

prior to March 25, 1932, was indebted to the defendant and to other creditors of the same class on unsecured debts provable in bankruptcy in the sum of approximately \$20,000.00; that on said July 26, 1930, and at all times subsequent thereto, [21] said Kemp-Booth Company Limited, through its officers, had knowledge of the insolvency of said House of Irving.

## V.

That within four months prior to March 25, 1932, the bankrupt paid to the defendant in money the sum of \$600.00 in amounts and on dates as follows: December 14, 1931, \$200.00; December 29, 1931, \$200.00; January 20, 1932, \$200.00.

## VI.

That within four months prior to March 25, 1932, the further and additional sum of \$100.00 was paid to the defendant by the bankrupt under the following circumstances; On November 25, 1931, the defendant, being a creditor of the bankrupt on open account for the sum of \$1911.00, and in addition thereto being the holder of a certain trade acceptance for \$200.00 which by its terms fell due and became payable on November 25, 1931, and the bankrupt being unable on that date to pay said trade acceptance, but being able to pay one-half thereof, and the bankrupt having notified the defendant that it was unable to pay said trade acceptance, and said trade acceptance having been placed in the Pacific National Bank of Seattle, the depository of defendant, prior thereto, defendant having been given



credit for the face value of said trade acceptance on its account by said bank on its endorsement and guaranty of said trade acceptance when due; thereupon, to present the dishonor of said trade acceptance and the surcharging of the same against the account of the defendant, the defendant made, executed and delivered to the bankrupt its check for \$100.00 dated November 25, 1931, and received from the bankrupt therefor the bankrupt's check for \$100.00 payable to the order of the defendant, postdated November 30, 1931; that on November 25, 1931, the bankrupt used the defendant's check for \$100.00, together with \$100.00 of its own money, to pay the trade acceptance at the [22] bank, and on November 30, 1931, paid said postdated check of \$100.00.

#### VII.

That within four months prior to March 25, 1932, the bankrupt assigned and transferred to the defendant certain accounts receivable of the face value of \$2694.25, the same being part of the bankrupt's property, on the following dates: January 29, 1932, accounts aggregating \$2408.25; and on February 18, 1932, accounts aggregating \$286.00; that the defendant assigned and transferred, for collection, to the Pacific National Bank of Seattle said accounts receivable, and at the time of the trial of this cause there had been collected by said bank and paid over to the defendant on account of certain of said accounts receivable the aggregate amount of \$905.50; that since the trial of said cause there has been collected no additional amount; that there remains in

the hands of the defendant or said Pacific National Bank of Seattle for collection, the balance of said accounts receivable so assigned by the bankrupt to defendant.

#### VIII.

That within four months prior to March 25, 1932, towit, on or about February 24, 1932, the bankrupt transferred and delivered to the defendant certain merchandise consisting of woolen suitings of the stipulated and agreed value of \$1652.23; that the defendant ever since then has exercised dominion over said merchandise, asserted title thereto and sold a part of the same, and that the unsold portion of said suitings so delivered by the bankrupt to the defendant has been so intermingled with the other stock of the defendant corporation that it cannot now be identified.

#### IX.

That each and every of said payments of money, assignment [23] of accounts receivable and transfer and delivery of merchandise was made by the bankrupt to be applied, and was by the defendant applied upon defendant's claim against the bankrupt, which was thereby paid substantially in full; that the effect of such cash payments and transfers by the bankrupt to the defendant was and is an appropriation of the assets of the bankrupt and a depletion of the insolvent fund, and was made so as to enable the defendant to obtain a greater percentage of its debt than any other creditor of the bankrupt

of the same class as the defendant, and such transfers and payments were and are each a preference under the Bankruptcy Act of 1898 and the amendments thereto; save and except, however, a payment by the bankrupt to the said defendant of the sum of \$100.00 on or about November 30, 1931, which was for a present consideration.

### X.

The defendant received such payments and transfers knowing, or having reasonable cause to believe, that said bankrupt was insolvent, and that it was receiving a preference under the Bankruptcy Act and the laws of the State of Washington.

### XI.

That plaintiff has insufficient assets in his hands to pay in full the indebtedness of the bankrupt, or any more than approximately 10% of the amount of the claims of the general creditors, which aggregate about \$17,000.00 in addition to the indebtedness owing by the bankrupt to the defendant.

### XII.

That heretofore and prior to the commencement of this action the plaintiff duly demanded of the defendant the restitution and return to the estate in bankruptcy of the money and property preferentially transferred, as above found, but the same was refused. [24]

### XIII.

That on July 26, 1930, and at all times herein mentioned, the defendant was and is a wholesale

woolen house, and the bankrupt was and is a merchant tailor; and on said date the defendant and the bankrupt did enter into a written agreement in words and figures as follows, towit:

(Here is set out the contract of July 26, 1930, a copy of which appears in the court's memo decision of April 7, 1934, *supra.*) [25]

#### XIV

That pursuant to said agreement, thereafter at divers times prior to the adjudication in bankruptcy of said bankrupt, the defendant delivered to the bankrupt certain merchandise consisting of woolen suitings; that the bankrupt consumed a portion of said merchandise in the conduct of its business in making tailor made suits for its customers; that the bankrupt never sold any of said merchandise to any person whomsoever; that a portion of said merchandise from time to time was re- [26] turned by the bankrupt to the defendant and credit was given therefor; that the merchandise hereinabove described as having been returned by the bankrupt to the defendant was all such merchandise as remained in the possession of the bankrupt previously delivered pursuant to said written agreement on or about said February 24, 1932.

#### XV.

That said written contract was never filed in the office of the County Auditor as a conditional sale contract, as provided by Section 3790 of Remington's Revised Statutes of Washington, since

amended by Washington laws of 1933, page 465, Section 1, Remington's Revised Statutes of Washington annual pocket part, Section 3790; nor was said agreement ever recorded as a chattel mortgage, as provided by Section 3781, nor recorded as provided by Section 3788 of said Remington's Revised Statutes of Washington.

#### XVI.

Within four months prior to March 25, 1932, to-wit, on or about February 24, 1932, the bankrupt delivered to the defendant certain merchandise consisting of woolen suitings of the stipulated and agreed value of \$1652.23, which said merchandise had theretofore been delivered by the defendant from time to time from its stock of merchandise to the said House of Irving under the terms of said written contract hereinbefore set out in paragraph numbered XIII. Since the defendant received back the said merchandise from the said bankrupt on or about the 24th day of February, 1932, the defendant has exercised dominion over said merchandise, asserted title thereto and sold a part of the same and the unsold portion of said suitings so delivered by the bankrupt to the defendant have been so intermingled with the other stock of the defendant that the same cannot now be [27] identified.

#### XVII.

Plaintiff has insufficient assets in his hands to pay the full indebtedness of the bankrupt or any

more than approximately 10 per cent of the amount of the claims of all other general creditors which aggregate about \$17,000.00.

DONE in Open Court this 7th day of Nov., 1934.

EDWARD E. CUSHMAN,

1117  
1118

Judge.

Upon the foregoing Findings of Fact, Supplemental findings of fact 1 & 2, and those included in the memorandum decision dated April 7, 1934, the court as a matter of law concludes as follows:

#### I.

That plaintiff is entitled to recover from the defendant \$600.00, which amount was paid by the bankrupt to the defendant, with interest at the rate of 6% per annum upon \$200.00 thereof from December 14, 1931, to the date of decree; upon \$200.00 thereof from December 29, 1931, to the date of decree; and upon \$200.00 thereof from January 20, 1932, to the date of decree.

#### II.

That plaintiff is further entitled to recover from defendant on account of merchandise transferred and delivered by bankrupt to defendant on or about February 24, 1932, \$1,652.23, with interest at the rate of 6% per annum from that date until the date of decree.

#### III.

That plaintiff is entitled to recover from the defendant because of accounts receivable transferred

by the bankrupt to the defendant, of the face value of \$2,699.25, the amount collected, towit: \$905.50, with interest thereon at the rate of 6% [28] per annum from November 21, 1933, to the date of decree.

IV.

That plaintiff is entitled to the accounts receivable which have not been collected or reassigned to the plaintiff.

V.

That plaintiff is entitled to recover his costs and disbursements herein to be taxed.

VI.

That decree be entered in accordance herewith.

DONE in Open Court this 7th day of Nov., 1934.

EDWARD E. CUSHMAN,

Judge.

Presented by Earl G. Rice.

[Endorsed]: Lodged Oct. 4, 1934.

[Endorsed]: Filed Nov. 7, 1934. [29]

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[Title of Court and Cause.]

SUPPLEMENTAL FINDING OF FACT NO. 1

In order to make a record of a fact occurring since the trial of this cause, the court makes the following

SUPPLEMENTAL FINDING OF FACT:

On the 3rd day of November, 1934, the defendant made, executed and delivered to the plaintiff an

assignment of the following accounts which had been assigned by the House of Irving, the bankrupt herein, to the defendant, Kemp-Booth Company Limited, as set forth in the Findings of Fact herein:

Name of Debtor	Amount Owing
Kenneth Atkins,	\$50.00
R. L. Brackett,	128.50
Dr. E. F. Cornellussen,	54.50
Asahel Curtis,	10.00
J. C. Dummett,	31.00
L. S. Duryee,	50.00
A. B. England,	150.00
C. G. Evans,	115.00
H. J. Hartnett,	11.50
Frank Heffernan,	149.00
Dave Himelhoch,	39.50
Ed. Hogg Jr.,	96.00
Charles Holcomb,	35.00
A. Everett Miller,	82.00
John S. Mountain,	30.00
L. C. Nesbit,	26.50
Dr. D. H. Nickson,	35.00
A. V. Peterson,	38.00
Hugh Phelps,	110.00
Don H. Phillips,	30.00
Irving Ringer,	165.75
M. H. Shindell,	127.00
John W. Sparling,	75.00
R. S. Talbot,	42.00

[30]



The following accounts which arose from the making of suits out of cloth which was furnished by the defendant:

Customer's Name	Balance Due
Thomas S. Allen,	34.50
C. F. Lester,	18.50
Lew Wallace,	54.00

have not been re-assigned to the plaintiff.

DONE in Open Court this 7th day of November, A. D. 1934.

EDWARD E. CUSHMAN,  
District Judge.

[Endorsed]: Filed Nov. 8, 1934 [31]

[Title of Court and Cause.]

SUPPLEMENTAL FINDING OF FACT  
NUMBER 2

The Court, upon further consideration of Plaintiff's proposed Finding of Fact No. XX, makes now the following Supplemental Finding of Fact No. 2:

Subsequent to the execution of the agreement set out in Finding XIII and without knowledge of the same the following became creditors of the bankrupt House of Irving in the amounts set opposite their respective names:

Metropolitan Building Company, landlord rent,	\$1731.89
Seattle Broadcasting Station K.O.L., adver- tising	647.13
Seattle Daily Times, advertising,	463.60

DONE in Open Court this 8th day of November, 1934.

EDWARD E. CUSHMAN,  
District Judge.

Defendant excepts to the foregoing Finding on the grounds that the same is not supported by the evidence and is contrary to the evidence and is not within the issues in the case and has no bearing upon the validity of the written agreement described in Finding XIII.

RIDDELL & BRACKETT,  
Attorney for Defendant.

Exception allowed.

EDWARD E. CUSHMAN,  
Dist. Judge.

[Endorsed]: Filed Nov. 8, 1934 [32]

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[Title of Court and Cause.]

DEFENDANT'S PROPOSED FINDINGS OF  
FACT AND CONCLUSIONS OF LAW.

The above entitled cause having come on regularly for trial before the court, the Honorable Edward E. Cushman, District Judge, presiding, and a jury being waived, on November 21, 1933; the plaintiff being present and represented by Earl G. Rice and William E. McClure, his counsel; the defendant being represented by James H. Garrett, its secretary, and by Charles F. Riddell, its counsel, and witnesses having been sworn and examined on the

issues of fact raised by plaintiff's bill of complaint in equity and the defendant's answer thereto, and having been continued from time to time until December 4, 1933, at which time the court, having heard the arguments of counsel, and considered the testimony and the evidence, took the case under advisement with privilege reserved to counsel for the parties to file briefs, and thereafter said briefs having been filed, the court on April 7, 1934, having filed and entered his memorandum decision herein and ordered these Findings, now, therefore, the Court makes the following [33]

#### FINDINGS OF FACT:

James M. Galvin, the plaintiff, is a resident of King County, in the Western District of Washington, and a citizen of the state of Washington, and at all times herein mentioned was and now is trustee in bankruptcy of House of Irving under the provisions of the Bankruptcy Act of 1898 and amendments thereof; and this bill of complaint in equity is brought to recover a preference under Sec. 60-b of the Act.

#### II.

At all times herein mentioned House of Irving was and is a Washington corporation, and the defendant, Kemp-Booth Company Limited, was and is a Washington corporation with its principal place of business in Seattle, King County, Washington.

## III.

On April 11, 1932, the House of Irving, a corporation, was adjudged bankrupt by order that day duly entered in Bankruptcy cause No. 32348 by the United States District Court for the Western District of Washington, Northern Division, sitting at Seattle, on involuntary bankruptcy petition filed March 25, 1932, by creditors against House of Irving; on May 2, 1932, plaintiff was duly appointed trustee of the bankrupt and ever since and now is such trustee, duly qualified and acting.

## IV.

On July 26, 1930 and for many years prior thereto and approximately until the filing of the bankruptcy proceedings which are involved in this litigation, the said House of Irving was and continued to be engaged in the retail merchant tailoring business in the city of Seattle with minor stocks of merchandise consisting of suit patterns and samples in the possession of agents in several other cities in the state of Washington. [34] During said entire period of time and continuously until the present, said defendant, Kemp-Booth Company Limited has been and is engaged in the wholesale woolen business, selling its merchandise to individual merchant tailors.

## V.

For several years prior to July 26, 1930, as a result of a disagreement, said House of Irving had been doing a minimum amount of business with

Kemp-Booth Company Limited and on the date last aforesaid owed it on open account the sum of \$485.59, the oldest item of which was from thirty-five to forty days old.

## VI.

For many years prior to July 26, 1930, the consignment of merchandise consisting of cloth cut to suit patterns from the wholesale woolen houses to the merchant tailors who were engaged in retailing the same in the regular course of business had been and up to the time of the bankruptcy in question in this case continued to be a recognized method of merchandising between wholesale woolen houses and retail merchant tailors. At least two of the competitors of the defendant, towit, the Ditmer Woolen Company and John B. Ellison & Sons, being wholesalers, had consigned merchandise consisting of suit patterns to said House of Irving, which consigned merchandise was re-taken by the said John B. Ellison & Sons and the said Ditmer Woolen Company immediately preceding the bankruptcy of the said House of Irving. There is no evidence in this record that the plaintiff in this case ever questioned the validity of said consignment agreements with the said two woolen houses. On or about the 26th day of July, 1932, by an oral agreement between said House of Irving and the defendant, the defendant agreed to extend to said House of Irving a line of credit up to \$3,000.00 for merchandise delivered to the said House of Irving consisting of [35] suit patterns and agreed to deliver to the said House of

Irving such suit patterns as the said House of Irving might request on consignment under the terms and conditions of a written contract which is hereinafter set out in full.

#### VII.

For many years prior to July 26, 1930, defendant had merchandised its woolens in the form of bolts of cloth and suit patterns, both upon sale and upon consignment, to merchant tailors upon the form of contract which was executed between the House of Irving and defendant on July 26, 1930, and which is in the following words and figures, towit:

(Here is set out the contract of July 26, 1930, a copy of which appears in the Court's Memo Decision of April 7, 1934, *supra*). [36]

#### VIII.

Almost immediately upon the execution of said written agreement between the said House of Irving and said defendant, the said balance of \$485.59 due to said defendant upon open account by said House of Irving was paid and thereafter from time to time said merchandise was delivered by defendant to said House of Irving, both upon straight sale and upon consigned account. When merchandise was sold by defendant to said House of Irving it was charged upon the books of the defendant against said House of Irving and that account for goods sold continued to mount from about the month of September, 1930, until February, 1932, at which time said House of Irving ceased business. Pay-

ments on said account were made from time to time.

When merchandise was delivered by defendant to said House of Irving under the written contract which is set out in paragraph numbered VII. above, a memorandum of the number of the suiting which identified the goods in the records of the defendant and the yardage of the material delivered was noted upon a card index which was kept by the defendant. No charge was made against the House of Irving. Merchandise continued to be delivered under said written agreement from time to time. When the same was received by the House of Irving, such woollens were placed upon its shelves as suiting having attached to it a tag which bore the name and house mark of the defendant, together with the number of the suiting which sufficed to identify it. Such suitings were placed in the stock of the said House of Irving. Monthly, said defendant by a clerk examined the suitings which remained in the possession of said House of Irving; in this manner discovered those which had been sold; whereupon a charge was made upon the books of said defendant against the [37] said House of Irving and that charge was paid by the House of Irving as follows: When checks were received by the defendant from said House of Irving, the amounts thereof were applied either against the open account or against the charges for consigned merchandise which was no longer upon the shelves of the House of Irving, as said defendant determined. Such payments paid

the accounts for consigned merchandise in full until the month of July, 1931, but on the open account credit was extended and the said open account gradually increased in size so that on the 12th of February, 1932, there was due from the said House of Irving to the said defendant upon open account \$2266.29 and upon the account for merchandise which was delivered under said written contract described in paragraph VII. above the amount of \$1502.17.

#### IX.

On and for more than four months prior to March 25, 1932, said House of Irving was indebted to creditors on unsecured debts provable in bankruptcy in the sum of approximately \$20,000, and that the said House of Irving had lost in its merchandising operations approximately \$1,000.00 a month during the calendar years 1930 and 1931.

#### X.

On November 25, 1931, there fell due at the Pacific National Bank of Seattle, Washington, a trade acceptance in the sum of \$200.00, which said House of Irving had executed and delivered to said defendant, and with which said defendant had credited the account of the said House of Irving and had immediately and in due course negotiated with said Pacific National Bank. On said 25th day of November, 1931, said House of Irving advised said defendant that it was unable to pay the full amount of said trade acceptance, but was able to pay one-half thereof. [38] Whereupon by an oral agreement



between said House of Irving and said defendant, said defendant exchanged with said House of Irving the check of the defendant in the sum of \$100.00 for the check of Fashion Plus, which was a concern, the assets of which were taken over by the plaintiff herein as a part of the assets of the said House of Irving. With the said \$100.00, the proceeds of said check of defendant, and \$100.00 of its own, the said House of Irving paid the said trade acceptance on said 25th day of November, 1931, and on November 30, 1931, the said check of said Fashion Plus was paid and the money thereon received by the defendant.

## XI.

On December 14, 1931, said House of Irving paid the defendant \$200.00. On the 22nd day of Sept. 1931, the said House of Irving delivered to said defendant three trade acceptances in the sum of \$200.00 each, the last of which was due on December 22, 1931, and paid the Pacific National Bank on Dec. 29, 1931, and also on Jan. 13, 1932 delivered acceptances due Jan. 29, 1932, February 20, 1932 and March 15, 1932. The said trade acceptances were immediately negotiated by the defendant to the Pacific National Bank which at all times thereafter and until the said House of Irving ceased to do business remained the property of the said Pacific National Bank and upon which this defendant was an indorser. Said House of Irving paid one trade acceptance to said bank in the sum of \$200.00 on the 29th day of Dec. 1931, and another in the

sum of \$200.00 on the 29th day of Jan. 1932, and said third and fourth trade acceptances were never paid. When the defendant received said trade acceptances from said House of Irving the same were credited upon the account of the said House of Irving upon the books of the defendant.

## XII.

Within four months prior to March 25, 1932, the bankrupt [39] assigned and transferred to the defendant certain accounts receivable of the face value of \$2694.25 on the following dates: January 29, 1932, accounts aggregating \$2408.25; February 18, 1932, accounts aggregating \$286.00. That the defendant assigned and transferred for collection to the Pacific National Bank said accounts receivable and that at the time of the trial of this cause there had been collected by said bank and paid over to the defendant on account of said accounts receivable the aggregate amount of \$905.50. Since the trial of this cause no additional amounts have been collected and there remains in the hands of the said Pacific National Bank for collection the balance of said accounts receivable so assigned by the bank to defendant. Said accounts receivable at the time they were delivered to the defendant had a market value of 40 per cent of their face. The said accounts were turned over by said House of Irving to the defendant upon the oral request of the defendant and a representation of the said House of Irving that the said assigned accounts arose solely from merchandise which the defendant had delivered to said House

of Irving pursuant to said written contract hereinbefore set forth in paragraph VII. Upon the trial of this cause it was disclosed that many of the accounts thus turned over were created by the tailoring, sale and delivery of suits, the cloth of which was not delivered to said House of Irving under said written contract. Of the payments of \$905.50 which were received by said defendant as aforesaid, the sum of \$444.50 was paid upon suits, the cloth of which was delivered by the defendant to said House of Irving under said written agreement and the value of said cloth in such suits was \$147.87. The expense of making said collections is not shown in this record. [40]

### XIII.

Within four months prior to March 25, 1932, to-wit, on or about February 24, 1932, the bankrupt delivered to the defendant certain merchandise consisting of woolen suitings of the stipulated and agreed value of \$162.23, which said merchandise had theretofore been delivered by the defendant from time to time from its stock of merchandise to the said House of Irving under the terms of said written contract hereinbefore set out in paragraph numbered VII. Since the defendant received back the said merchandise from the said bankrupt on or about the 24th day of February, 1932, the defendant has exercised dominion over said merchandise, asserted title thereto and sold a part of the same and the unsold portion of said suitings so delivered by the bankrupt to the defendant have been so inter-

mingled with the other stock of the defendant that the same cannot now be identified.

#### XIV.

On or about the 24th day of February, 1932, the defendant first learned that the bankrupt was in a failing condition and first knew or had reasonable cause to believe that the said bankrupt was insolvent on or about the 24th day of February, 1932.

#### XV.

Plaintiff has insufficient assets in his hands to pay the full indebtedness of the bankrupt or any more than approximately 10 per cent of the amount of the claims of all other general creditors which aggregate about \$17,000.00.

#### XVI.

Heretofore and prior to the commencement of this action the plaintiff duly demanded of the defendant the return to the estate in bankruptcy of the money and property above described, but the same was refused. [41]

#### XVII.

The said written contract described in paragraph VII. above was never filed in the office of the County Auditor of King County, Washington, as a conditional sale contract, nor was it ever recorded as a chattel mortgage, nor was it ever recorded under Sec. 3788 of Remington's Revised Statutes of Washington.

XVIII.

There are at least four general creditors whose accounts became due by said bankrupt subsequent to the 26th day of July, 1930, as follows: Metropolitan Building Company, landlord, for rent, \$1731.89; Seattle Broadcasting Station, KOL, for advertising, \$285.00; Seattle Post-Intelligencer, for advertising, \$647.13; Seattle Daily Times, for advertising, \$463.60. None of said creditors described in this paragraph had knowledge of the said agreement set out in paragraph numbered VII. hereof.

DONE in open court this ..... day of .....,  
A. D. 1934.

.....  
District Judge.

And from the foregoing Findings of Fact, the court deduces the following

CONCLUSION OF LAW:

I.

That the above cause should be dismissed with prejudice and the defendant should have judgment against the plaintiff for its costs and disbursements herein to be taxed.

DONE in open court this ..... day of .....,  
A. D. 1934.

.....  
District Judge.

[Endorsed]: Filed May 7, 1934 [42]

[Title of Court and Cause.]

DEFENDANT'S EXCEPTIONS TO FINDINGS  
OF FACT AND CONCLUSIONS OF LAW  
ENTERED AND EXCEPTIONS TO THE  
COURT'S REFUSAL TO ENTER DE-  
FENDANT'S PROPOSED FINDINGS AND  
CONCLUSIONS.

Comes now the defendant and excepts to the making and entry of the Findings of Fact and Conclusions of Law entered herein and to the refusal of the Court to enter Findings of Fact and Conclusions of Law requested by the defendant.

I.

Defendant excepts to the making and entry of Finding of Fact Number IV on the ground that the same is not supported by competent evidence.

II.

Defendant excepts to the making and entry of Finding of Fact Number V on the ground that the same is not supported by competent evidence.

III.

Defendant excepts to the making and entry of Finding of Fact Number VI on the ground that the same is not supported by competent evidence.

IV.

Defendant excepts to the making and entry of Finding [43] of Fact Number VII on the ground that the same is not supported by competent evidence.

V.

Defendant excepts to the making and entry of Finding of Fact Number VIII on the ground that the same is not supported by competent evidence.

VI.

Defendant excepts to the making and entry of Finding of Fact Number IX on the ground that the same is not supported by competent evidence.

VII.

Defendant excepts to the making and entry of Finding of Fact Number X on the ground that the same is not supported by competent evidence.

VIII.

Defendant excepts to the making and entry of Finding of Fact Number XI on the ground that the same is not supported by competent evidence.

IX.

Defendant excepts to the making and entry of Finding of Fact Number XII on the ground that the same is not supported by competent evidence.

X.

Defendant excepts to the making and entry of Finding of Fact Number XIV on the ground that same is not supported by competent evidence.

## EXCEPTIONS TO CONCLUSIONS

## I.

Defendant excepts to Conclusion of Law Number I on the ground that same is erroneous and not applicable to the facts proved by the evidence. [44]

## II.

Defendant excepts to Conclusion of Law Number II on the ground that same is erroneous and not applicable to the facts proved by the evidence.

## III.

Defendant excepts to Conclusion of Law Number III on the ground that the same is erroneous and not applicable to the facts proved by the evidence.

## IV.

Defendant excepts to Conclusion of Law Number IV on the ground that the same is erroneous and not applicable to the facts proved by the evidence.

## V.

Defendant excepts to Conclusion of Law Number V on the ground that the same is erroneous and not applicable to the facts proved by the evidence.

RIDDELL & BRACKETT

Attorneys for Defendant.



DEFENDANT'S EXCEPTIONS TO THE  
COURT'S REFUSAL TO ENTER FIND-  
INGS AND CONCLUSIONS PROPOSED  
BY DEFENDANT.

I.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number I on the ground that the same is supported by all of the competent evidence in the case.

II.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number II on the ground that the same is supported by all of the competent evidence in the case. [45]

III.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number III on the ground that the same is supported by all of the competent evidence in the case.

IV.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number IV on the ground that the same is supported by all of the competent evidence in the case.

V.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number V on the ground that the same is supported by all of the competent evidence in the case.

## VI.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number VI on the ground that the same is supported by all of the competent evidence in the case.

## VII.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number VII on the ground that the same is supported by all of the competent evidence in the case.

## VIII.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number VIII on the ground that the same is supported by all of the competent evidence in the case.

## IX.

Defendant excepts to the refusal of the Court to make [46] and enter defendant's proposed Finding Number IX on the ground that the same is supported by all of the competent evidence in the case.

## X.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number X on the ground that the same is supported by all of the competent evidence in the case.

## XI.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Num-

ber XI on the ground that the same is supported by all of the competent evidence in the case.

XII.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number XII on the ground that the same is supported by all of the competent evidence in the case.

XIII.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number XIV on the ground that the same is supported by all of the competent evidence in the case.

XIV.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number XVI on the ground that the same is supported by all of the competent evidence in the case.

XV.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number XVII on the [47] ground that the same is supported by all of the competent evidence in the case.

XVI.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Finding Number XVIII on the ground that the same is supported by all of the competent evidence in the case.

Defendant excepts to the refusal of the Court to enter defendant's proposed Conclusions of Law as follows:

I.

Defendant excepts to the refusal of the Court to make and enter defendant's proposed Conclusion of Law Number I.

RIDDELL & BRACKETT

Attorneys for Defendant.

The foregoing exceptions to Findings of Fact and Conclusions of Law given and refused were called to the Court's attention at the time of the signing and entry of the decree herein and the said Exceptions are hereby noted.

Dated at Seattle, Washington, this 8th day of Nov., 1934.

EDWARD E. CUSHMAN

District Judge.

[Endorsed]: Lodged Oct. 4 1934.

[Endorsed]: Filed Nov. 8, 1934 [48]

In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

In Equity No. 939

J. M. GALVIN, as Trustee in Bankruptcy of the  
House of Irving, a corporation, Bankrupt,  
Plaintiff,

vs.

KEMP-BOOTH COMPANY, LIMITED,  
a corporation,

Defendant.

### DECREE

Findings of Fact and Conclusions of Law having heretofore been made by the court and entered herein in favor of the plaintiff and against the defendant, now, therefore, it is

CONSIDERED, ORDERED, ADJUDGED AND DECREED that the plaintiff, J. M. Galvin as trustee in bankruptcy of the House of Irving, a corporation, bankrupt, do have and recover of and from the defendant, Kemp-Booth Company Limited, a corporation, the sum of \$3581.66 with interest thereon at the rate of 6% per annum from this date, together with his costs and disbursements herein to be taxed; and it is further

CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendant transfer and assign to the plaintiff all those accounts receivable formerly received by the defendant from the House

of Irving which have not been collected or re-assigned to the plaintiff.

DONE in Open Court this 8th day of November, 1934.

EDWARD E. CUSHMAN,  
Judge.

Presented by Earl G. Rice.

[Endorsed]: Filed Nov. 8, 1934 [49]

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[Title of Court and Cause.]

DEFENDANT'S EXCEPTION TO DECREE

To the making and entry of the decree herein, defendant excepts on the ground that the same is contrary to the weight of the evidence and because there is no evidence to support the same and because the same is based upon the erroneous conclusion of law that the evidence proved a sale of goods rather than a consignment thereof.

RIDDELL & BRACKETT

Attorneys for Defendant.

Defendant's exception to the decree this day signed and filed is allowed.

Signed at Seattle, Nov. 8th, 1934.

EDWARD E. CUSHMAN

Dist. Judge.

[Endorsed]: Filed Nov. 8, 1934 [50]

[Title of Court and Cause.]

STATEMENT OF THE EVIDENCE [51]

JAMES H. GARRETT,

called as an adverse witness by the plaintiff, on

Direct Examination,

testified:

I am Secretary-Treasurer of defendant, Kemp-Booth Company Limited. The record of merchandise transactions with the bankrupt from July 26, 1930, to March 25, 1932, consists of loose sheets bound by post binders. The record of current stock was kept on cards and the record of stock on hand in box files. Merchandise disposed of appears in the transfer file.

Plaintiff's Exhibit 1 consisting of five original ledger sheets of the account kept with the bankrupt was admitted in evidence. A copy of the said exhibit is as follows: [52]

(Testimony of James H. Garrett.)

PLAINTIFF'S EX. 1  
HOUSE OF IRVING  
1111 Second Ave.  
Seattle, Wash.

Date	Folio	Description	Charges	Credits	Balance	Previous Balance
1926						
May						
3	J 53	Int on T A	1.95			
3	J 53	"	21.83			
Jun						
18	18972	Net	2 232.43 v			
24	19077	Oct. 1 10/7 60/5	2 50.00 v			
24	19067	Oct. 1 10/7	2 78.32 v			
24	19868	Net P U	2 15.27 v			
26	19099	Jul 1 10/7/60/5	2 7.34 v			
28	19123	Oct. 1 10/7/60/5	2 39.16 v			
Jul						
19	19379	Oct 1 10/7 60/5	19.58			
19	19372	Aug 1 10/7/60/5	6.61			
21	J 60	Int on T A	16.15			
30	19538	Oct 1 10/7	166.63			
30	19543	Sep 1 10/7	.74			
Aug						
2	19793	10/7 60/5	48.33			
7	19960	Net	14.26			
14	20070	Sep 1 10/7 60/5	1.47			
16	20198	Oct 1 10/7	43.91			
17	20299	Sep 1 10/7	35.29			
19	20354	Sep 1 10/7	30.27			
26	20624	Sep 1 10/7	35.76			
29	21329	Nov 1 10/7	21.25			
24	21310	Oct 1 10/7	9.38			
Oct						
1	25050	10/7 60/5	8.50			
12	25488	Nov 1 10/7	31.67			
19	25687	Dec 1 10/7	42.50			
27	26077	Nov 1 10/7	13.13			
Sep						
16		By ALLCE		25.00	962.73	
Nov						
18	26626	10/7 60/5	38.58		1001.31	962.73
23	26733	Dec 1 10/7	32.08		1033.39	1001.31
29	26823	10/7 60/5	16.13		1049.52	1033.39



(Testimony of James H. Garrett.)

Date	Folio	Description	Charges	Credits	Balance	Previous Balance
1926						
Dec						
22	27177	Jan 1 10/7	1 10.50		1060.02	1049.52
23	R 151	By Payt		1 10.50	1049.52	1060.02
31	2935	By ALLCE		45.00	1044.52	1049.52
1927						
Jan						
11	27387	Feb 1 10/7	32.08		1036.60	1044.52
17	R 159	By Payt		422.52	614.08	1036.60
31	27930	Net P U	16.23		630.31	614.08
Feb						
17	28492	Net P U	17.87		648.18	630.31
Mar						
22	29558	May 1 7%	21.52		669.70	648.18
24	R 179	By Payt		669.70		669.70
Apr						
21	30397	Net	13.00		13.00	
May						
6	30648	Jun 1 7%	19.58		32.58	13.00
6	R 195	By Payt		13.00	19.58	32.58
21	R 200	By Payt		19.58		19.58
Jun						
2	30995	Net	17.27		17.27	
24	R 210	By Payt 30995		17.27		17.27
						[53]
Jul						
12	31485	Net P U	26.99		26.99	
22	31579	Sep 1 7%	7.83		34.82	26.99
30	31768	Sep 1 7%	11.75		46.57	34.82
Sep						
23	R 233	By Payt		46.57		46.57
Oct						
7	33350	Nov 1 7%	11.69		11.69	
8	33369	Nov 1 7%	4.42		16.11	11.69
26	33670	Dec 1 7%	20.72		36.83	16.11
Nov						
14	R 244	By Payt		36.83		36.83
29	34178	Jan 1 7%	34.16		34.16	
1928						
Jan						
16	R 255	By Payt		34.16		34.16
Jun						
14	37045	Jul 1 7%	26.59		26.59	

(Testimony of James H. Garrett.)

Date	Folio	Description	Charges	Credits	Balance	Previous Balance
1928						
Jul						
3	37277	Aug 1 7%	11.00		37.59	26.59
12	37395	Aug 1 7%	69.52		107.11	37.59
19	37533	Sep 1 7%	6.88		113.99	107.11
Aug						
15	37896	Oct 1 7%	27.63		141.62	113.99
Sep						
10	38351	GRATIS			141.62	141.62
Oct						
19	39056	Dec 1 7%	.61		142.23	141.62
24	J 189	Canc Inv 39056		.61	141.62	142.23
22	R 304	By Payt		145.58 1 —	3.96 CR	141.62
27						
39668		Jan 1 7%	1 21.92		17.96	3.96
Dec						
3	39742	Jan 1 7%	1 20.72		38.68	17.96
26	40090	Feb 1 7%	1 39.00		77.68	38.68
1929						
Jan						
25	40639	Mar 1 7%	1 29.31		106.99	77.68
Feb						
25	41167	NET CASH P U	1 17.88			106.99
25	41166	Apr 1 7%	1 30.86		155.73	
Mar						
12	41543	Apr 1 7%	1 49.44		205.17	155.73
28	41821	May 1 7%	1 19.09		224.26	205.17
May						
10	42465	Jun 1 7%	1 9.56		233.82	224.26
17	42554	July 1 7%	1 19.09		252.91	233.82
20	42582	Jul 1 7%	1 7.97		260.88	252.91
21	42605	Jul 1 7%	1-3 62.51		323.39	260.88
31	42753	Oct 1 7%	4 95.85		419.24	323.39
Jun						
8	42878	Oct 1 7%	2 19.17		438.41	419.24
12	4671	MOSE RET 42878		2 19.17	419.24	438.41
Jul						
5	R 551	By Payt		1 321.28	97.96	419.24
9	R 352	by Payt		3 2.11	95.85	97.96
13	43352	Sep 1 7%	4 42.50		138.35	95.85
Aug						
5	43690	Sep 1 7%	4 7.67		146.02	138.35
17	43974	Oct 1 7%	4 27.42		173.44	146.02
19	43997	Oct 1 7%	4 46.67		220.11	173.44
Sep						
3	44442	Oct 1 7%	4 45.13		265.24	220.11

(Testimony of James H. Garrett.)

Date	Folio	Description	Charges	Credits	Balance	Previous Balance
1929						
Sep						
23	44919	Nov 1 7%	4 22.92		288.16	265.24
26	45013	Nov 1 7%	4 9.17		297.33	288.16
Oct						
1	45145	Jan 1 7%	5 53.64			297.33
3	45177	Nov 1 7%	4 14.50			
7	45251	Jan 1 7%	5 19.50		384.97	
16	45438	Dec 1 7%	4 22.92		407.89	384.97
15	45985	Jan 1 7%	5 26.44		434.33	407.89
19	46048	Jan 1 7%	5 22.92			434.33
19	46050	Jan 1 7%	5 17.19		474.44	
Dec.						
6	46284	Jan 1 7%	5 20.83		495.27	474.44
16	46426	Feb 1 7%	5 16.88		512.15	495.27
23	46496	Feb 1 7%	5 17.00			512.15
23	46497	Net cash	5 6.38			
24	46506	Feb 1 7%	5 32.66		568.19	
Jan 1930						
13	46685	Feb 1 7%	5 19.13		587.32	568.19
Feb						
10	47147	Mar 1 7%	5 30.42		617.74	587.32
20	47298	Apr 1 7%	6 19.58		637.32	617.74
Mar						
3	47438	Apr 1 7%	6 19.58		656.90	637.32
5	R 398	By Payt		4 334.75	322.15	656.90
17	47688	May 1 7%	6 36.09			322.15
17	47689	May 1 7%	6 30.94		389.18	
31	47945	May 1 7%	6 32.08		421.26	389.18
Apr						
2	47978	May 1 7%	6 12.50			421.26
7	48075	May 1 7%	6 21.67			
5	J 381	One Half Telegraph Charge to Boston	6 .90		456.33	
11	38142	Jun 1 7%	7-10 72.08			456.33
15	48192	Jul 1 7%	10 60.84		589.25	
24	48286	Jun 1 7%	10-19 32.92		622.17	589.25
29	48362	Jun 1 7%	10 41.77			622.17
29	48367	Jun 1 7%	10 22.92		686.86	
May						
2	48418	Jun 1 7%	19 1.47		688.33	686.86
12	48527	Jun 1 7%	19 .81			688.33
14	48573	Jun 1 7%	19 35.00		724.14	
19	48619	Jul 1 7%	19 27.42		751.56	724.14
24	48690	Jul 1 7%	19 19.83		771.39	751.56

(Testimony of James H. Garrett.)

Date	Folio	Description	Charges	Credits	Balance	Previous Balance
1930						
Jun						
11	48970	Jul 1 7%	19 35.04	4	806.43	771.39
17	R 421	By Payt		282.99	523.44	806.43
28	49174	Aug 1 7%	20 12.03		535.47	523.44
Jul						
5	49240	Aug 1 7%	20 21.67			535.47
8	49267	Aug 1 7%	20 1.09			
8	49276	Aug 1 7%	20 34.38		592.61	
14	B 427	By Payt		6 173.34	419.27	592.61
15	49358	Aug 1 7%	20 38.98		458.25	419.27
18	49394	Sep 1 7%	20 27.34		485.59	458.25
31	49552	Nov 1 7%	20 229.60		715.19	485.59
Aug						
11	49660	Net cash	20 8.50			715.19
15	49731	Sep 1 7%	20 .86			
18	49770	Sep 1 7%	20 10.31		734.86	
						[55]
29	49912	Oct 1 7%	20 12.03		746.89	734.86
Sep						
12	R 437	By Payt		163.02	583.87	746.89
12	50156	Cash 7%	7 153.68	7	737.55	583.87
16	50225	Oct 1 Net	9 203.86		941.41	737.55
27	50426	Oct 1 Net	9 14.21		955.62	941.41
Oct						
7	50650	Cash 7%	8 149.19		1104.81	955.62
9	R 443	By Payt		8 149.19	955.62	1104.81
9	R 443	By Disc Payt 9/12 3%		4.61	951.01	955.62
14	50776	Nov 1 7%	20-21 8.67		959.68	951.01
17	50857	Nov 1 7%	21 9.17			959.68
20	50902	Dec 1 7%	21 44.59		1013.44	
24	50979	Dec 1 7%	21 15.42	9	1028.86	1013.44
24	R 448	By Payt		218.07	810.79	1028.86
27	51017	Dec 1 7%	21 34.38			810.79
29	51054	Dec 1 7%	21 21.56	866.73		
Nov						
1	51115	Net 30 days	21 21.94			866.73
3	51128	Dec 1 7%	21 16.88			
3	51133	Net 30 days	21 34.53			
4	51163	Cash 7%	10 68.76			
5	51185	Dec 1 7%	21 15.47			
6	51195	Net 30 days	21 22.76			
10	51248	Net 30 days	21 16.25		1063.32	
13	51289	Net 30 days	21 16.25			1063.32
14	51316	Net cash	21 13.80			
15	51322	Dec 1 7%	21 16.88		1110.25	

## (Testimony of James H. Garrett.)

Date	Folio	Description	Charges	Credits	Balance	Previous Balance
1930						
Nov.						
18	51349	Net cash	10 54.34			1110.25
18	51350	Dec 1 7%	21 6.50		1171.09	
24	51461	Net cash	10 31.68		1202.77	1171.09
25	51487	Net 30 days	21 16.25		1219.02	1202.77
Dec						
1	51565	Net 30 days	21 21.95			1219.02
2	51580	Jan 1 7%	21 7.66		1248.63	
9	51684	Net 30 days	21 22.76			1248.63
10	51709	Net 30 days	21 16.45			
10	51714	Cash 7%	10 88.28		1376.12	
11	R 462	By Payt		10 453.19	922.93	1376.12
19	51826	Feb 1 7%	21 24.38		947.31	922.93
24	51868	Net 30 days	21 16.25		963.56	947.31
29	51895	Net 30 days	21 16.25			963.56
29	51907	Net 30 days	21 18.28			
30	51911	Feb 1 7%	21 7.19			
31	51938	Cash 7%	11 80.43		1085.71	
Jan 1931						
2	51959	Cash 7%	21 19.17			1085.71
6	51993	Feb 1 7%	12-21 46.67			
8	52023	Feb 1 7%	21 25.88		1177.43	
15	52111	Mar 1 7%	21 27.31		1204.74	1177.43
19	5342	Mdse Retd 51993		12 38.00	1166.74	1204.74
20	R 472	By Payt		11 80.43	1086.31	1166.74
27	52251	Net 30 days	21 25.59		1111.90	1086.31
Feb						
2	52358	Mar 1 7%	21 7.67			1111.90
5	52400	&				
	52399	Cash 7%	13-14 424.27			
10	52468	Mar 1 7%	21-23 38.34		1582.18	
24	52669	Mar 1 7%	23 20.13			1582.18
[56]						
Mar						
	59315	Mar 1 Net	23 .61		1602.92	
4	52771	Net 30 days	23 15.84			1602.92
5	52797	Apr 1 Net	23 33.92			
6	52814	Apr 1 7%	23 13.75			
12	52888	May 17%	23 59.16		1725.59	
12	R 486	By Payt		13 150.00		1725.59
19	R 489	By Payt		14 274.27	1301.32	
17	52987	June 1 Net	23 16.25		1317.57	1301.32

(Testimony of James H. Garrett.)

Date	Folio	Description	Charges	Credits	Balance	Previous Balance
1931						
Apr						
2	53292	Net 30 days	23 15.23			1317.57
3	53301	Net 30 days	23 16.25			
8	53380	Net cash	23 16.78		1365.83	
14	53490	May 1 7%	23 4.47			1365.83
16	53510	Net cash	15-18 65.00			
16	53511	Cash 7%	15-16-17 254.61			
16	53530	Cash 7%	15 34.59		1724.50	
20	53581	June 1 7%	23 29.58			1724.50
20	53585	June 1 7%	23 22.92		1777.00	
29	R 502	By Payt		15 136.60	1640.40	1777.00
May						
1	53789	Net 30 days	23 15.23			1640.40
1	53796	June 1 7%	23 31.67			
4	53814	June 1 7%	23 22.92			
5	53836	Net 30 days	23 6.50			
8	53895	Jun 1 Net	23 6.09			
8	53899	Jun 1 7%	23 3.72		1726.53	
11	53915	Jun 1 Net	23 15.84			1726.53
13	53959	Jun 1 7%	23 21.67			
13	53960	Net cash	23 16.25			
14	53976	Aug 1 7%	23 104.99		1885.28	
9	R 505	By Payt		16 100.00	1785.28	1885.28
11	R 505	By Payt		17 111.10		1785.28
12	R 506	By Payt		18 6.50	1667.68	
15	53995	Cash 7%	19 73.34			1667.68
19	54066	Jul 1 7%	23 18.66		1759.68	
22	54108	Net cash	23 26.21		1785.89	1759.68
Jun						
2	54229	Jul 1 7%	23 9.38		1795.27	1785.89
8	54317	Jul 1 7%	23 44.44		1839.71	1795.27
9	R 512	By Payt		19 203.97	1635.74	1839.71
13	54379	Jul 1 7%	23 26.25			1635.74
17	54427	Jul 1 7%	23 19.09		1681.08	
20	54471	Aug 1 7%	23 17.88			1681.08
23	54510	Net 30 days	23 21.94		1720.90	
24	54528	Aug 1 7%	23 22.92		1743.82	1720.90
26	54551	Net 30 days	23 24.38			1743.82
29	54588	Aug 1 7%	23 14.88			
29	54594	Aug 1 7%	23 9.75			
30	54680	Sep 1 7%	23 14.17		1807.00	

(Testimony of James H. Garrett.)

Date	Folio	Description	Charges	Credits	Balance	Previous Balance
1931						
Jul						
1	54621	Net 30 days	16.25			1807.00
1	54623	Aug 1 7%	30.28			
6	54656	Aug 1 7%	32.67			
6	54668	Aug 1 7%	20.78			
13	54714	Cash 7%	<b>20</b> 105.85			
13	54715	Net cash	16.25			
10	J 551	By T/A		20 500.00	1529.08	
17	54758	Aug 1 7%	18.56		1547.64	1529.08
						[57]
21	R 520	By Payt Discount		20 10.59	1537.05	1547.64
29	54853	Net 30 days	21.58		1558.63	1537.05
Aug						
19	55080	Sep 1 7%	10.88			1558.63
21	55100	Net 30 days	64.75		1634.26	
Sep						
9	55346	Net 30 days	38.74			1634.26
10	55350	Oct 1 7%	19.58			
10	55358	Oct 1 7%	7.83		1700.41	
17	55498	Cash 7%	151.67			1700.41
17	55499	Net cash	15.42		1867.50	
23	55592	Nov 1 7%	7.83			1867.50
22	J 575	By T/A		21 600.00	1275.33	
Oct						
1	55715	Net 30 days	14.63			1275.33
5	55779	Net 30 days	6.00		1295.96	
13	55889	Cash 7%	47.92		1343.88	1295.96
16	55952	Net 30 days	30.00			1343.88
19	55970	Net 30 days	14.63		1388.51	
24	56086	Net 30 days	1.12		1389.63	1388.51
Nov						
6	56250	Net 30 days	14.63		1404.26	1389.63
11	56321	Dec 1 7%	19.58			1404.26
11	56322	Net 30 days	15.00		1438.84	
18	56432	Cash 7%	95.42			1438.84
18	56433	Net cash	10.00		1544.26	
25	C 580	Check Advance	<b>22</b> 100.00		1644.26	1544.26
Dec						
1	R 546	By Payt		22 100.00	1544.26	1644.26
14	R 549	By Payt		23 200.00	1344.26	1544.26
Jan 1932						
13	J 623	By T/A		23 600.00	744.26	1344.26

(Testimony of James H. Garrett.)

Date	Folio	Description	Charges	Credits	Balance	Previous Balance
1932						
Feb						
10	R 560	By Payt		24 5.00	739.26	744.26
17	R 561	By Payt		24 50.00	689.26	739.26
17	J 634	Tfr from Fashion Plus	184.95		874.21	689.26
Jan						— 874.21
29	J 637	Payment by Assigned A/C of House of Irving		2408.25		
Feb						
18	J 637	Payment by Assigned A/c		280.00		
18	J 637	Transfer Payts to Assigned Accounts 24	55.00		—1765.04	—1765.04
24	C 601	Advance on T/A	200.00		—1565.04	—1565.04
12	57436	Cash 7%	1096.94			
12	57436	Net Cash	253.62		— 214.48	
24	57547	Cash 7%	57.81		— 156.67	— 214.48
29	J 638	Correction on As- signments Under Date of 1/29/32	.50		— 156.17	— 156.67
Mar						— 156.17
16	C 606	T/A Retd.	200.00		43.83	
May						
31	66082	Net Cash (Joe Merrill)	85.90		129.73	43.83

[58]

These ledger sheets detail all cash and merchandise transactions. A notation shows the appropriation of payments to charges and the invoice number of each transaction. The exhibit shows 122 sales to the bankrupt with 24 credit entries, most of which are for money payments. Some represent discounts. Of the 122 items shown, I identify 25 as on account of goods used from consigned stock.

Plaintiff's Exhibit 2 was admitted in evidence. A copy of said Exhibit 2 is as follows: [59]



(Testimony of James H. Garrett.)

PLAINTIFF'S EX. 2  
ASSIGNED ACCOUNTS OF HOUSE OF  
IRVING

MEMO ACCT.

Date	Folio	Description	Charges	Credits	Balance	Previous Balance
JAN 1932						
29	J 637	Transfer from House of Irving a/c	2408.25			
FEB						
18	J 637	Transfer from House of Irving	286.00			
18	J 637	Transfer Payts House of Irving		55.00	2639.25	
24	R 562	By Payt O Garver		5.00	2634.25	2639.25
29	J 638	Correction on Transfer from House of Irving Under date of 1/29/32		.50	2633.75	
29	R 563	By Payt Gehres		41.00		2633.75
29	R 563	By Payt Horsfall		61.00	2531.75	
MAR						
1	R 563	By Payt Paddock		59.00	2472.75	
3	R 564	By Payt Williams		58.50		2472.75
4	R 564	By Payt Kaeding		50.00		
12	R 566	By Payt Rode		20.00		
14	R 566	By Payt Nickson		50.00		
16	R 566	By Payt Kyes		13.50		
16	R 566	By Payt M May		60.00	2220.75	
APR						
9	R 571	By Payt r Umoff		56.00	2164.75	2220.75
9	R 571	By Payt Chas Holcomb		5.00	2159.75	2164.75
9	R 571	By Payt M. Shindell		2.00	2157.75	2159.75
19	R 574	By Payt D. H. Nickson		50.00	2107.75	2157.75
22	R 574	By Payt L. S. Duryee		10.00		2107.75
26	R 575	By Payt O. E. Garver		10.00	2087.75	
MAY						
2	R 576	By Payt Geo Kadeing		15.00	2072.75	
11	R 576	By Payt Cora Rode		15.00	2057.75	2072.75
JUN						
2	R 582	By Payt Duryee		10.00	2047.75	
6	R 582	By Payt O Garver		5.00	2042.75	2047.75
13	R 584	By Payt Holcomb		5.00	2037.75	2042.75
23	R 586	By Payt Duryee		10.00	2027.75	2037.75

(Testimony of James H. Garrett.)

Date	Folio	Description	Charges	Credits	Balance	Previous Balance
1932						
JUL						
13	R 590	By Payt M. Kaeding		10.00	2017.75	
26	R 593	By Payt Sopwith		10.00	2007.75	2017.75
AUG						
13	R 596	By Payt C. F. Lester		50.00	1957.75	2007.75
SEP						
15	R 603	By Payt Corneliusen		5.00	1952.75	
28	R 606	By Payt L Wallace Holtz		16.00		1952.75
28	R 606	By Payt Kaeding		40.00		
28	R 606	By Payt Sopwith Holtz		10.00	1886.75	
OCT						
4	R 608	By Payt H. Lochow		28.00	1858.75	1886.75
19	R 612	By Payt S. Mountain Holtz		10.00	1848.75	1858.75
21	R 613	By Payt T S Allen		5.00	1843.75	1848.75
24	J 718	By Payt Col'n Exp Mountain		5.00	1838.75	1843.75
26	R 614	By Payt Sopwith Holtz		10.00	1828.75	1838.75
Dec 20	R 705	By Payt Sopwith		10.00	1818.75	1828.75
31	R 708	By Payt Dr. Corneliusen		3.00	1815.75	1818.75
Apr 14	R 735	By Payt Sopwith		10.00	1805.75	
June 21	R 756	By Payt Sopwith		11.50	1794.25	1805.75
Aug 14		By Payt Corneliusen		3.00	1791.25	1794.25
Sep 25	R 782	By Payt Corneliusen		3.00	1788.25	1791.25

[60]

Exhibit 2, supra, is a memorandum record showing the sum of \$906.00 received by Kemp-Booth Company on accounts assigned by the bankrupt to the defendant.

### PLAINTIFF'S EXHIBIT 3

was admitted in evidence. A copy of the exhibit is as follows:

(Testimony of James H. Garrett.)

## "HOUSE OF IRVING

1325 4th Ave.

Seattle, Wash.

## TRADE ACCEPTANCE MEMO ACCT.

Date	Description	Charges	Credits	Balance	Previous Balance
JUL 1931	T/A Date	Due			
	7/10/31	7/22/31 250.00			
		8/18/31 250.00		500.00	
JUL 22	T/A Paid		250.00	250.00	500.00
AUG 18	T/A Paid		250.00		250.00
SEP 22	T/A Date	Due			
	9/22/31	10/20/31 200.00			
		11/24/31 200.00			
		12/22/31 200.00		600.00	
OCT 20	T/A Paid		200.00	400.00	600.00
NOV. 24	T/A Paid		200.00	200.00	400.00
DEC. 22	T/A Paid		200.00		200.00
JAN 1932					
13	T/A Date	Due			
	1/13/32	1/29/32 200.00			
		2/20/32 200.00			
		3/15/32 200.00		600.00	
JAN 29	T/A Paid		200.00	400.00	600.00
FEB 20	T/A Paid		200.00	200.00	400.00
MAR. 16	T/A Retd		200.00		200.00

Exhibit 3 is a memorandum of trade acceptances given by the bankrupt and discounted by Kemp-Booth with its bank. The commission referred to in the contract was the usual 7 per cent discount applicable to all purchases paid for within ninety days. In only a few instances was it earned or allowed. On July 26, 1930, the bankrupt was indebted to Kemp-Booth on open account in the sum of \$485.59. Part of the account was past due, though none of it was over 35 or possibly 40 days past due. Payments subsequently made [61] by the bankrupt were applied upon the oldest items, including the

original open account, or against merchandise used from consigned stock. Some of the credit entries upon the ledger account as indicated by notation were applied in payment of goods purchased outright, some in payment of goods used from consigned stock and some applied upon indebtedness prior to the consignment contract. The first payment made by bankrupt after the execution of the consignment contract was on September 12, 1930, in the sum of \$163.02 and was applied to cover \$153.68 worth of merchandise sold from consigned stock. The balance of approximately \$10.00 was applied on the old account. The next payment was on October 9, 1930, in the sum of \$149.19 and was applied against goods sold from consigned stock. A discount of \$4.61 was allowed upon this payment and was applied upon the old open account. The next payment was on October 24, 1930, in the sum of \$218.07 and was applied as against purchases of merchandise made on September 16 and 27. This apparently was an outright purchase though it is impossible to tell absolutely from the ledger. The next payment was made December 11, 1930, in the sum of \$453.19 and was applied over a number of items, several being sales or invoices for merchandise sold under the consignment arrangement and was partially applied on the old open account. The next credit entry is for the sum of \$38.00 which was for the return of a part of the merchandise a few days previous and which apparently had been

(Testimony of James H. Garrett.)

an outright purchase. The next payment was made on January 20, 1931, in the sum of \$80.43 and apparently covered merchandise used from consignment. The next payment on March 12, 1931, in the sum of \$150.00 was applied upon consigned merchandise. The next payment on March 19, 1931, in the sum of \$274.27 was also applied on consigned merchandise. Each payment on an individual account was given an index number on our ledger and the number was [62] also set opposite the debit item so that at any time one can identify the items covered by particular payments. It is impossible, however, to identify absolutely from the ledger alone charges made for consigned merchandise, but because they are always billed cash 7 per cent, or net cash, while no other merchandise is billed that way, one can readily tell or readily suspect that the item is a charge for consigned merchandise, though this can be confirmed only by reference to the original invoices. The old open account was paid off by a final payment made July 10, 1931, on which date bankrupt owed Kemp-Booth for goods used from consigned stock and for goods sold, the sum of \$1529.08. On January 10, 1932, the balance owing was \$1344.26. During the year 1931 the balance due averaged approximately \$1500.00. No accounts receivable prior to January 10, 1932, had been assigned to the defendant and but \$38.00 worth of merchandise had been returned.

(Testimony of James H. Garrett.)

Before July 26, 1930, Kemp Booth had no goods on consignment with the bankrupt. When the consignment contract was entered into no separate account was made upon the ledger, but all money transactions were carried upon the same ledger account. No book entry was made when merchandise was sent to the bankrupt on consignment, but charges were made from time to time as the goods were actually resold by the bankrupt.

About 200 suit patterns worth two or three thousand dollars were delivered to the bankrupt under the consignment contract. Instead of requiring Mr. Irving to make up a report of sales in addition to an inventory on the first of each month, we by arrangement with him sent a representative to check the consigned stock approximately once each month to ascertain what had been disposed of. A memorandum would be made up of the merchandise sold and demand would be made on the bankrupt for payment. Even though the bankrupt did not pay for the merchandise used from consigned stock for six or [63] eight months after its use, no charge was entered against it on Kemp-Booth's books, but the bankrupt would know how much was owing Kemp-Booth from the memoranda supplied by Kemp-Booth and from its own accounts. We would then make demand on Mr. Irving for payment for that amount and when the amount was paid as it would be subsequently the regular invoice or bill would be written for that merchandise and entered

(Testimony of James H. Garrett.)

in our ledger account (Plaintiff's Exhibit 1) as was payment. The uniform discount on woolens was 7 per cent and there was no difference in the method of accounting for this discount before or after the date of the consignment contract. The only difference was in the dating of the invoices. On merchandise sold outright, the invoices were payable 30 to 120 days as might be agreed and the discount allowed if payment was made before the date named. On goods used from consigned stock the bankrupt was not entitled to the discount, though it may in some cases have received it. It would not receive it whenever six months or a year elapsed before payment.

It is the custom of woolen houses, including our own, to allow a 7 per cent discount for payment before an agreed date, but this discount is in no sense a commission. We never paid the bankrupt a commission.

On December 14, 1931, bankrupt paid to the defendant the sum of \$200.00; on December 29, 1931, bankrupt paid to the defendant the additional sum of \$200.00 and on January 20, 1932, bankrupt paid to the defendant the additional sum of \$200.00. These payments were credited by the defendant upon bankrupt's open account.

(Testimony of James H. Garrett.)

On

Cross Examination,

in response to questions by Mr. Riddell, the witness states:

I have been in the woolen business eleven years. It is current practice with most all woolen houses to have their merchandise handled by tailors on consignment. Kemp-Booth in the past eleven years has had about 12 such accounts in Seattle. The practice was adopted by us after consultation with our attorneys [64] and was intended to protect us in carrying on our business in a lawful and orderly manner. We have handled all consignment accounts under a similar contract drawn for us by our attorneys. This consignment contract was handled no different from any other of our consignment arrangements.

The consignment contract was introduced in evidence as defendant's Exhibit 1, copy of which is set out in court's Memorandum Decision of April 7, 1934, page 14 supra.

After the execution of the contract, the course of business with reference to an outright sale of merchandise was to make out an invoice showing the manner of shipment, the price per yard and the total price of the shipment, such as defendant's Exhibit A-3, which is an invoice to the bankrupt on thirty days' net. Invoices on consigned goods when the same were reported sold by the consignee



(Testimony of James H. Garrett.)

bore the notation "memorandum," which in the woolen goods trade means "consignment." When goods left the defendant's place of business other than by sale, the transaction was recorded in a separate set of records. The original entry consisted of a memorandum of the shipment upon a separate form filed separately from the invoices and was a part of the stock and shipping department records and was not kept in the accounting department at all.

Exhibit A-5 is such a memorandum, showing 12 suit patterns delivered to the bankrupt at \$4.87 per yard, without the total amount being extended. It bears the office notation showing that the shipment was entered upon our stock cards and that cards have been made for the customer's consignment account. There is no notation regarding entry upon our book account. This method of memorandum recording merchandise delivered on consignment is exactly the same as that used in keeping track of the movement of merchandise between our branch offices. [65]

When merchandise which has been sold is returned to us it is credited on merchandise sold outright and a credit memorandum is issued and credited upon our books.

Defendant's Exhibit A-6 is such a memorandum showing a credit to one Lindquist in the sum of \$22.85.

(Testimony of James H. Garrett.)

When merchandise out on consignment is returned, as is frequently the case, because unless cut up into suits we may call for them any time we have a sale for them, a credit memorandum is issued for purchased merchandise, but bears a separate serial number and is not entered upon our accounting record, but is handled only by the stock record department and is designated as a consignment credit.

Defendant's Exhibit A-7 is a credit memorandum to the bankrupt on February 24, 1932, for a large quantity of merchandise consisting of 148 separate cuts listed by pattern numbers and yardage, without any notation of price or extension of total. A stock control record is kept at the Seattle office which shows an exact record of all merchandise whether in the Seattle stock, the Los Angeles stock, San Francisco stock, or in the hands of consignees.

Defendant's Exhibit A-8 and A-8-1 are cards identified by style numbers. They show the entire history of pattern number 8142 from the time received from the mills until disposed of.

Exhibit A-8 shows in the upper left hand corner the number of the suit pattern and then of the mill which produced the goods. It shows \$4.00 as the original selling price per yard. In the first column is the customer's name and next the invoice or credit memorandum number. Some of these numbers refer to straight sales, some to consignments and some to transfers of merchandise between

(Testimony of James H. Garrett.)

offices. The next column shows the number of yards [66] received by us and the next the number of yards disposed of and the other column by subtraction shows the number of yards left in stock. The next column represents stock sent to San Francisco. Another column represents stock sent to Los Angeles. The column "S. F. memo" keeps account of any stock those offices sent out on consignment. Sales are shown in the first column marked "Yards delivered," and by the invoice number attached. A consignment from that stock is shown in the column farther to the right. On the first page of Exhibit A-8 none of the merchandise was consigned. It was sold or turned over to branch offices. On the second sheet, memorandum entry 7741-M shows the record of a delivery on consignment to a customer designated by the symbol "R." The customer did not dispose of the merchandise so we called it in and gave him credit and put it back in the Seattle stock. Later the exhibit shows on January 1, 1932, we delivered the suit pattern on consignment to the bankrupt where it remained several months and was later returned. In addition to the control stock card, Kemp-Booth kept a card for each length of woolens delivered on consignment. These are kept in a separate record place.

Exhibit A-8 and Exhibit A-8-1 is the control record of the stock and the supplemental record of consigned merchandise is a record kept by the consignees showing at all times exactly what stock is on

(Testimony of James H. Garrett.)

hand and what he is chargeable with. The consignment account with the bankrupt was designated by the letter "M." When a piece of goods was delivered to the bankrupt the stock record clerk made up a card from the memorandum of the shipment such as defendant's Exhibit A-5 and from that she made up the entries in the stock control record. If the shipment was a consigned account, she made a separate individual card for each separate piece of merchandise. For example, card No. 598 [67] shows that three and one-third yards of that pattern were delivered to the bankrupt on April 30, 1931, the price per yard being \$6.37. By a date stamp on May 14, 1931, the card shows that we made an inventory check of the bankrupt's stock on that date and the parcel was still there. At some later date it was sold by the bankrupt and was invoiced to him by number 54714.

All such cards showing all transactions with the bankrupt are introduced as Defendant's Exhibits A-9-1, 2, 3. The invoices rendered would be somewhat subsequent to the sale by the bankrupt and would be on the date on which we secured payment. This card record would not show the date of sale by the bankrupt or the date upon which our representative first discovered on checking up that the item had been sold. Upon checking up, our representative, if he found an item still held by the bankrupt, would place a date stamp on the consignment card. If the check-up found that the

(Testimony of James H. Garrett.)

item had been sold he reported it to the stock clerk, who made a separate record. The foregoing method applied to the House of Irving and everybody else. The cards indicate six, eight or ten check-ups upon the inventory. Of the cards, group A-9 represent merchandise which had either been sold by the bankrupt and invoices issued by us or had been returned to us by the bankrupt prior to the termination of the consignment contract in the early part of 1932. Group A-9-1 represents the merchandise returned to us at the termination of the contract on February 24, 1932. Group A-9-2 represents merchandise returned to us within four months of the time when the accounts receivable were assigned other than the 148 patterns returned on February 24. Group A-9-3 represents items sold by the bankrupt on final check-up, that is, the balance of merchandise not returned to [68] us on February 24. These items we had previously recorded as consigned. They were subsequently invoiced to the bankrupt after taking the assignment of accounts receivable. Exhibit A-9-2 represents the items shown on the third page of Exhibit A to the answers to interrogatories. The dates of such returns are set out, the earliest being November 27, and the last February 2, 1932. Upon examining our records I now correct the statement made by me in answer to interrogatory No. 3, by the explanation that the first trade acceptance was paid by the bankrupt out of its own funds to the bank with

(Testimony of James H. Garrett.)

which we had discounted it. The second was paid by the \$200.00 which we advanced for that purpose. The third was not paid and was charged back to us by the bank.

On

Redirect Examination

the witness testified:

In response to the demand of the plaintiff to produce records showing the sale, consignment or disposal of the 35 paterns mentioned by number, being the patterns used in the making up of suits included in the list of assigned accounts, I cannot state which of the pattern numbers represent cloth supplied by my company on consignment to the bankrupt as we have no record or any way of obtaining any information to whom our consigned goods were sold. The bankrupt did not furnish us, nor did we request a list of purchasers of suits made from our consigned goods. When the accounts were assigned to us we made no investigation to ascertain whether these accounts were for suits from our cloth. I do not know of my own knowledge that any assigned account was for suits made up from our consigned goods. Payments made by the bankrupt were by check or trade acceptance. I do not recall any cash payment. There was no agreement between ourselves and the bankrupt that it should keep segregated the proceeds derived from suits made up from our goods. I did not know and did not inquire [69]

(Testimony of James H. Garrett.)

whether the bankrupt was mingling the proceeds of the sale of the garments made from our goods with the proceeds of the sales from other goods. I made no inquiry into the handling of their funds in any manner. I was at their place of business infrequently, but am quite sure that they did not have exhibited upon the premises anything to indicate that they were agents of Kemp-Booth. That is a thing ordinarily kept covered up by the tailors. We considered it confidential to the two parties to the contract. If another woolen house dealing with the bankrupt had made inquiry from us whether we had goods on consignment in the hands of the bankrupt it would have depended entirely upon circumstances whether the information would have been given. No woolen house gives out that kind of information though it sometimes leaks out. I do not recall that we ever told anyone that we had goods on consignment in the possession of the bankrupt. I do not believe we were ever asked that question. There was no understanding with the bankrupt regarding what it should disclose or not disclose. I did not personally check up suit patterns with the bankrupt. We had a man whose duty it was to do so.

J. H. IRVING,

witness on behalf of the plaintiff, on

Direct Examination,

testified:

I was the president of the House of Irving, a Washington corporation, from July 26, 1930, to March 25, 1933. The corporation conducted a general tailoring business making suits on special order for our customers. In addition there was for a certain time a business conducted by me under the trade name of Fashion-Plus. Its assets were turned over in the bankruptcy proceedings because its accounts were so intermingled with the bankrupt's that it was impossible to segregate the same. The [70] bankrupt bought merchandise from various woolen houses and in July, 1930, it had eight merchandise houses and four or five trimming houses on its books. We closed our accounts with Kemp-Booth Company due to disagreement with Mr. Booth in 1926. ater in 1927 or 1928 we became friendly with Mr. Booth. In 1930 I met Mr. Booth in New York at his request. I was financially disturbed. I needed money and needed woolens. He said he would back me to a certain extent and for that reason I signed the contract. I was so badly involved I saw no way of getting out and I explained the situation to Mr. Booth. He and I had been in business together. He thought I had the ability to pull out. He said, "I will help you out." I said, "You must understand, Mr. Booth, I am in pretty bad shape." He says, " I realize all about it." I owed



(Testimony of J. H. Irving.)

\$32,000.00 at that time. The accounts were past due. I was being pressed and harrassed until it was almost impossible to do any business. He said, "I will help you out on that. I will furnish you goods to the extent of \$3,000.00. It will be put in a contract. That will give you a chance to get your breath and you can pay off some of those fellows who are after you the worst. \* \* \* These goods will be consigned to you according to contract. You must live up to it." I says, "I will do the best I can. I will live up to that and I will take care of it." But business got worse instead of better. In 1931 I was in terrible bad shape again. I could not keep on going. Creditors were threatening me. They were going to close me up if I did not pay a certain amount. In February, 1932, I went to my attorney and he said, "I think the only thing you can possibly do is make an assignment. I made the assignment in February, 1932. I did not keep the agreement with Kemp-Booth to pay each month for the merchandise used during the preceding month. The only reason I did not do it was because I imposed on the good [71] nature of Mr. Booth. I had so many pressing debtors that I owed so I took their money and paid it to the very people you represent—took Kemp-Booth money and paid them and left Kemp-Booth holding the sack as they are holding it today." This was not consented to by Kemp-Booth. They told me I should pay them more; insisted upon my paying them more, but it was too late. Before making the con-

(Testimony of J. H. Irving.)

tract I had been buying goods from Kemp-Booth and I owed them something like four or five hundred dollars. After the contract was made this balance soon increased to approximately \$1500.00. This ran up "very quickly, because I was badly harassed by people whose accounts were over-due." Just before the assignment was made three or four accounts were in the hands of attorneys for suit, but there were no accounts in the hands of attorneys for collection late in 1931. Between July, 1931, and January, 1932, Kemp-Booth frequently asked me for money according to the agreement and insisted upon my paying them. However, they carried me along hoping that if they did so I could get out of it. If you take the oldest bill it is perhaps true that I was behind approximately a year in payments due Kemp-Booth. But then the books would show "I was paying some on account from time to time. Of the stuff I had of theirs in my house, when I used their stock up I would pay for it because it was their goods." I discussed my financial condition two or three times with Mr. Booth or Mr. Garrett after making the consignment agreement.

"Q. Were they aware of the fact that you were way behind with your other creditors?

A. I wasn't so far behind with my other creditors, because I kept paying up. In the last twelve months I paid my creditors \$6,000.00, so when this thing happened I was pretty close.

(Testimony of J. H. Irving.)

Q. There was \$20,000.00 in claims filed and allowed as general [72] claims?

A. There shouldn't have been over \$15,000.00."

I made the assignment for the benefit of creditors because I was pressed by creditors holding open accounts which were just and due and I was told that I must pay or they were going to bring drastic action. My attorney advised me, "There is only one thing for you to do in the condition you are in." That there was no use paying three or four and leaving the remainder holding the sack. The assignment for the benefit of creditors was made about the last day of February, 1932. Shortly afterwards creditors proceeded with involuntary bankruptcy. Regarding the \$100.00 check on November 30, 1931, I had given Kemp-Booth three trade acceptances. One was due and the bank, which was the holder, insisted upon payment. I explained to Mr. Garrett that I did not have the money and asked him to lend me the amount for a few days. He did so and I gave him my check. The \$100.00 which he gave me with my balance was sufficient to cover the \$200.00 trade acceptance at the bank. The three trade acceptances given on January 13, 1932, were not paid because of bankruptcy. Between November 22, 1931, and March, 1932, I returned to Kemp-Booth a large number of suit patterns which they claimed had been turned over to me on the consignment agreement. It was their merchandise and when the

(Testimony of J. H. Irving.)

matter came up they insisted upon its return. I did not return any pattern which I had received from them on open account or received from any other manner than under the consignment contract. I also assigned to them \$2,684.00 of accounts. "The only house that I had a written contract for consigned goods with was Kemp-Booth; Ellison & Co. put goods in my house and Detner Company put goods in my house. I explained to those gentlemen any time they wanted the goods I would return [73] them or pay for them and along in January, 1932, I returned their goods. I paid them in full for anything and everything that I owed them on consigned merchandise. The only house that I did not pay was Kemp-Booth and the only reason I did not pay Kemp-Booth was because I didn't have the money nor could I get it and the next thing for me to do \* \* \* was to give them as near as I could something representing cash and in doing that I took the accounts receivable and gave them those accounts. It was a voluntary act on my part because I thought it was the right thing to do to satisfy them as near as I could and frankly the only people holding the sack today is Kemp-Booth." My books show woolen in stock on December 31, 1929, amounting to \$16,014.79. On December 31, 1930, we had in stock \$11,930.64. On December 31, 1931, we had on hand \$6,166.62. Plaintiff's Exhibits 7, 7-1, and 7-2 being statements of assets of the

(Testimony of J. H. Irving.)

bankrupt received in evidence do not include Kemp-Booth woolens claimed by them and later returned to them. The goods included are those bought and paid for on open account. The stock of Kemp-Booth goods carried by us at different times varied during the period covered by the consignment contract. Sometimes we would have quite a lot; other times not so many because they were coming and going all the time. At the beginning we got 35 or 40 patterns of three and one-third and three and one-half yards. They would ask us to return certain patterns if they were short and if our stock was depleted we would ask for others. Our consigned stock varied from time to time. At the time we returned the balance of the consigned goods I believe it amounted to some 160 suit patterns. The consigned stock during the period of the contract averaged between 150 and 200 suit patterns. At the time of the assignment in the latter part of February, 1932, the woolens on hand belonging to Kemp-Booth [74] were right up to the season. Of the goods which we had in stock, some were quite a number of years old, some even eight or ten years old. After making the contract with Kemp-Booth we bought very few pieces from other woolen houses. In reducing stock from \$14,000.00 to \$6,000.00 in two years the better patterns had been picked out, leaving the less desirable on hand. We adopted the policy of reducing the stock that belonged to us as fast as possible and not buying anything and reducing our indebtedness. In January and Febru-

(Testimony of J. H. Irving.)

ary, 1932, we probably reduced stock. The sales register would show. I do not think we had on hand as much as \$6,166.62 of woolens at the time we assigned to creditors. In July, 1930, and shortly before making the contract with Kemp-Booth we were not able to pay bills promptly in the course of business. Mr. Booth knew that fact when the agreement was made. I went into detail with him at that time. As a rule, subsequent to July, 1930, we took care of bills as they fell due. We did not pay up our old debts. We would pay some on account and buy more. We were never on a cash basis. Sometimes we paid cash. When we got sixty or ninety days we took it. After July, 1930, we never succeeded in paying up our debts and there was approximately \$15,000.00 of such debts at the time of the assignment. Within a few months prior to the assignment four creditors had placed their accounts in the hands of attorneys for collection threatening suit. I was not able to pay those accounts. Except for the aid Kemp-Booth gave me by furnishing the consigned stock and its leniency in requiring payment for goods used, I never would have been able to have continued in business during the year 1930. When I applied to Mr. Booth for help I explained the situation to him and showed him a statement. He understood the situation. Our books at the end of the year 1930 showed a loss of \$13,957.76, or [75] over \$1,000.00 a month, and the books also show a similar loss of \$12,715.39 during 1931. I do not believe Mr. Booth knew any-

(Testimony of J. H. Irving.)

thing about our financial condition in January or February, 1932. I did not tell anyone connected with Kemp-Booth about the matter. I had a talk with Mr. Booth about the middle of February. "You see when Mr. Booth and I entered into the agreement for him to supply me with goods, I had to explain to him I was in financial difficulties and I also promised him that if he would put goods in my house I would see he would get those goods back in the event I got into difficulty with any other firm; that the goods were his and I would return them \* \* \* and in 1932 in February \* \* \* I went down to Mr. Booth's place and explained to him. He thought it was time for me to return the goods. It looked as though I was in trouble. He says, 'If that is the case, see that they are down here,' and I did. In this it was my idea to live up to my agreement with him in person, that I would deal with him the same as I would deal with any other house I got goods from, either to return the goods or pay the money." I did not have the funds with which to pay Kemp-Booth in cash and so returned the goods. The return of the goods and the assignment of the accounts which he accepted at face value I believe just settled their account. The assignment to creditors was made on February 28, 1932, which was within a few days after the return of the goods to Kemp-Booth. The whole thing happened within four or five days—the whole business; the notice from the attorneys and the assign-

(Testimony of J. H. Irving.)

ment was made within, I think, four days. I do not know whether I told Mr. Booth, but at that time we intended to assign for the benefit of creditors. Some of the goods, 12 pieces, were returned before I went to our attorney and some a few days later. I knew at the time I turned the goods back that I had to quit business because of the pressure of other creditors. Our place of business was at 1323 Third Avenue near Union Street. It was 90 by 21 feet. The patterns were on racks displayed in three and one-third yard lengths on open shelves. [76] Some goods were displayed in the window. We did not keep the goods furnished by Kemp-Booth absolutely separated from other stock. We tried to keep them separate, but in handling and putting them back they would get mixed up. Once in a while we would go through them and every week we checked up. In showing goods we did not tell the customers whether the goods came from Kemp-Booth or elsewhere. A ticket attached to one end of the bolt of goods shoved into the roll told where it came from and when it was received. The ticket on goods received from Kemp-Booth would have the initials "K. B." upon it, the pattern number, the yardage and as a rule the price per yard in code. All woolen houses put such tags on their goods when they send them out. The tag did not show whether the goods had been sent on consignment, an outright sale or bought on credit or whether paid for or not. We did not make a practice of exhibiting the tags to



(Testimony of J. H. Irving.)

customers. We never called the attention of a customer to the fact that Kemp-Booth claimed a lien upon the goods until they were paid for. The customer knew nothing about our business, where we got the goods or anything connected with it. We did business exclusively in the name of House of Irving. Neither letter-heads nor bill-heads stated that we were agents of Kemp-Booth or their representative. About 50 per cent of the business was credit. Cash received from suits was deposited in the bank to the credit of the House of Irving. We had no separate bank account in which we kept money in trust for Kemp-Booth. For suits sold on credit we billed the customer on a House of Irving bill-head. Moneys coming in on suits made from Kemp-Booth material went into our general bank account. In this bank account we mingled the proceeds of all sales of clothing whether made up from Kemp-Booth goods or otherwise. The money that came in was ours. Payment of running expenses, rent, salaries, [77] labor, payments to other creditors and to Kemp-Booth came out of this account. There was no sign anywhere about the place of business indicating that we were agents or consignees of Kemp-Booth. We told no customers or creditors that we held goods on consignment. If they knew it they must have found out elsewhere. I considered all business transactions confidential. I did not regard the agreement as secret because I got goods from other houses in the same way. I did not con-

(Testimony of J. H. Irving.)

sider it necessary to give the public or my creditors any information regarding my business. I did not sell any of the suit patterns. They were not mine to sell. Though the contract in clause nine provides that I had the right to sell suit patterns at certain prices to be furnished from time to time by Kemp-Booth Company Limited, I do not understand that I had any right to sell woolens. I think I had the right to sell woolens to be made in suits of clothes, but not as a piece of woolen. The contract no doubt reads that I have the right to sell suit patterns, but I interpret the meaning of the contract to be that I could not sell any of their materials; that is, to sell it as material, because that was their business. I was not supposed to sell woolens and did not, either of theirs or any other. I was in the tailoring business and did not sell woolens to anyone. I never sold any of Kemp-Booth Company's woolens. I acted entirely under the tenth clause of the contract which gave me the right until otherwise directed to make up any part or parts of merchandise into garments. We made up no suits until we had orders. We had no ready-made business. In every case the customers selected the goods and we designed the suit, fitted it and made it for him. On delivery of the suit to the customer we treated the sale as closed and entered it upon our books. Woolen for a suit is cut into 22 or 23 pieces. After it is cut up it is [78] no good to anyone else. There would be a great deal of loss sustained, practically

(Testimony of J. H. Irving.)

the value of the piece of woolen, if the customer did not accept the suit. In making the suit we use in addition to the woolens other items called tailors' findings or trimmings. There would be practically as many separate parts of these as of the woolens. Prices on suits ranged from sixty to one-hundred and fifteen dollars. The woolen cost five, seven or ten dollars a yard, depending upon materials. About one-fourth or one-third of the price is represented by the cost of the woolens. Twenty-five Dollars worth of woolens would take \$6.00 worth of trimming and \$35.00 labor cost. The suit would sell for \$100.00. The woolen going into a suit would not ordinarily constitute more than one-third of what the consumer paid for the suit. We never made a report of our sales of suits to Kemp-Booth, neither a list of customers nor the price of the sales. They never asked us to do so. From time to time we furnished an inventory of the merchandise remaining on hand and belonging to Kemp-Booth, but a man connected with their business checked up once a month. We would then take down every bolt of the stock out of the shelves and check each piece of cloth. That was necessary to get a thorough check-up. If any was missing we would refer to the sales record showing what had been sold. This would determine how much I owed them. In order to keep my books straight, I would ask them to give me a memorandum of the goods I had used. I would then debit myself with that and this would be the first entry

(Testimony of J. H. Irving.)

on my books with reference to consigned woollens. Up to that time I had kept only a memorandum of the goods delivered. Plaintiff's Exhibits 6-1 and 6-2 are two pages of bankrupt's ledger showing the Kemp-Booth account. A copy of Exhibits 6-1 and 6-2 are as follows: [79]

KEMP BOOTH LIMT.

Seattle

(Testimony of J. H. Irving.)

Date	Folio	Debits	Balance	Credits	Folio	Date
1929						1929
Dec. 31	Adj.	52.13		95.85	1504	June 3
	(g)			42.50	1517	July 13
				7.67	1525	Aug. 5
				27.42	1527	" 17
				46.67	1527	" 19
				45.13	1532	Sept. 4
				9.17		
				22.92	1538	" 26
				14.50		
				52.13	1541	Oct. 3
				53.64	1541	" 3
				19.50	1542	" 8
				22.92	1545	" 16
				26.44	1556	Nov. 16
				17.19		" "
				22.92	1556	" 19
				20.83	1562	Dec. 7
				16.88	1565	" 17
				32.66	1567	" 24
				17.00		
Dec. 31	Balance	568.19		6.38	1567	" 24

(Testimony of J. H. Irving.)

Date	Folio	Debits	Balance	Credits	Folio	Date
Mar. 5						1930
						Jan. 1
June 16	1592	319.70		568.19	Balance	Jan. 14
July 10	1617	282.99		19.13	Bill 1/13	Feb. 11
" 10	1627	164.67		30.42	Bill 2/10	" 20
Sept. 3	"	8.67		19.58	" 2/20	Mar. 3
" "	1642	152.26		19.58	" 3/3	
" "	1642	13.94		36.09		
				30.94	" 3/17 3/17	Apr. 15
				32.08	" 3/31	" 15
				200.91	Apr. bills	Apr. 30
				149.22	May "	May 31
				35.04	June "	June 30
				135.49	July "	July 31
				153.68	Aug. "	Aug. 31
Oct. 22	1648	218.07		229.60	Bill 7/31	Aug. 31
" 8						
" 8	1648	134.27		149.19	Sept. bills	Sept. 30
Dec. 10	"	14.92		218.07	Trimings	Oct. 22
" 31	1659	351.48		77.85	Oct. bills	" 31
		11.06				
1931						
Jan. 17	1661	15.69		68.76	" cash bills me.	Nov. 20
" "	1666	72.40		88.28	Nov. "	Nov. 29
" 31	1666	8.03		253.45	" reg. "	" "
Mar. 12	1667	38.00		109.45	Dec. "	Dec. 31
	1675	150.00	1028.77	80.43	" cash " me.	Dec. 31
				11.06	Disc. not allowed	" "



(Testimony of J. H. Irving.)

Anything shown on the record as purchased prior to 1930 was a cash item. The first purchase indicated was in 1929. The account was open and running at the time the consignment contract was made. Down to the date of the consignment agreement, I was buying goods from Kemp-Booth in a very small quantity on a 30 day account. The ledger account does not show cash purchases, but includes items purchased from Kemp-Booth on credit and items used from consigned stock. When they checked up and sent a memorandum of consigned goods used the amount would be credited to them on this account. Payments made to Kemp-Booth were likewise entered on this account and this is the only account on my books of merchandise consigned by Kemp-Booth. If a suit was made up and refused by the customer, we paid Kemp-Booth for the wools. If I used the goods I paid for them and if the customer who got the suit failed to pay, it was my loss. I was supposed to pay at the end of the month for materials used during the month. If a customer failed to pay when due Kemp-Booth did not extend the time. They knew nothing about my affairs in that respect nor did anyone else. Every few days suit patterns would be returned and exchanged. We never assigned to Kemp-Booth our interest in a suit made up. We never reserved with the customer a lien in favor of Kemp-Booth. We never delivered any finished suits to Kemp-Booth, nor did they ever claim such suits under paragraph 10 of the contract. The only accounts ever assigned to



(Testimony of J. H. Irving.)

Kemp-Booth were those assigned just before the assignment for the benefit of creditors was made. I segregated the accounts so assigned. I offered to assign all accounts receivable. Mr. Booth rejected this and said he wanted only accounts that came from Kemp-Booth goods according to the contract. The accounts I assigned either had the number of goods on the original order or for some reason I believe they were made up from Kemp-Booth goods. When the customer ordered a suit, we did not sell him the goods separately and con- [82] tract to make it up for him, but sold him a suit to be made from a particular pattern. The Commission agreement referred to in paragraph three of the contract was never carried out. We owed Kemp-Booth for the goods and we acknowledged that they had a right to the accounts until they got the money. On the accounts that would accrue from selling their materials we acknowledged that they had an equity in every sale that was made to that extent and that extent only. No commission was ever allowed, paid, or mentioned. The contract requires fire and burglar insurance. I took out fire insurance for myself, but not for them, and explained it to them at the time. I carried no burglar insurance.

Upon Mr. Riddell producing an insurance policy in response to plaintiff's notice to produce, and same being handed to the witness, the witness testified:

I identify the policy of insurance introduced as Exhibit 9 dated August 20, 1930, as one taken out by me upon clothing and material at 1325 Fourth

(Testimony of J. H. Irving.)

Avenue in the sum of \$3,000.00 insuring the House of Irving, loss, if any, payable to Kemp-Booth as its interest might appear; otherwise to the insured.

Witness is then shown several letters marked Plaintiff's Exhibit 10 for identification, and testifies:

Those are letters written by me as president of the House of Irving to one of our creditors, Gerhardt, Katz & Wankanski. That shows what I was going through for about a year, robbing one man to pay another.

Plaintiff's Exhibit 10, the letters referred to, was admitted in evidence and made a part of the record herein. Omitting the formal and immaterial portions, said letters contained the statements by the bankrupt concerning the condition of the business and his inability to meet his obligations at the several [83] dates following:

January 15, 1931—We note your remark about drawing on us. Please do not do this, for the reason that we would be compelled to return it if you do.

May 15, 1931—I realize the condition of our account and believe me if there is any way possible I am going to pay it as soon as I can. The facts of the case are, Pete, I am behind in my bills all the way from a year to two years and am just being hounded to death for payment, that with the condition of business and trying to keep going, it doesn't leave much to pay on

(Testimony of J. H. Irving.)

old accounts, and that means I'll have to quit and if I quit I suppose I will go to jail.

June 15, 1931—I have just been notified by the Pacific National Bank that our balance Saturday did not provide for payment of the check I gave to you and that they returned the check to you.

July 15, 1931—I regret to tell you it is impossible to send a check at this time, but you may depend upon our helping you out in the near future. The first money I get will be sent to you.

August 12, 1931—Your letter requesting a check received this morning, and I regret it is impossible to send you a check at this time.

September 15, 1931—I have your letter of the 10th asking for a remittance on account. Just at this time it is impossible to send anything. The months of July and August were terrible as far as business was concerned, but it is picking up a little now, and between the two companies I should be able to send something to you.

November 13, 1931—You have a check of mine coming due on the 15th and it was understood at the time I gave it to you that you would hold it and advise me before sending it through. Please hold it over a few days longer, as it is impossible for me to meet it at that time. I hope to have some money the latter part of the week and will send you some then.

(Testimony of J. H. Irving.)

Upon

Cross Examination

by Mr. Riddell, the witness testified:

When the assigned accounts were turned over to Mr. Booth he told me he wanted only accounts for suits made up from consigned goods. Some patterns received from Kemp-Booth on consignment were sent out as display samples to associated tailors. I think Kemp-Booth knew of this, but I am not sure. I think a few patterns were not returned from Yakima and Long View. During this same period we had goods on consignment from Detmer Woolen Co. and from Ellison & Co. and a few from Fisher & Sons. When we got into [84] financial trouble the goods belonging to Detmer Woolen Company were returned. We also returned the goods to Ellison & Co. I paid the difference between the amount of the goods received from them and the amount returned. When goods were received from Kemp-Booth Company, tags were attached bearing Kemp-Booth Company monogram. In checking up, the tags attached identified the goods. The policy of insurance was turned over to Kemp-Booth Company at once and has remained in their possession ever since.

Upon

Re-Direct Examination

by Mr. Rice, the witness testified:

Referring to the assigned accounts, the first account, that of Keith-Atkins, was made up from cloth

(Testimony of J. H. Irving.)

marked N. E. N., so marked because the original ticket was lost. I could not say for sure that this was from Kemp-Booth goods, but I am of the opinion that it was and that is the reason it was included in the assignment. The next account, that of Thomas Allen, was made up from consigned stock of Kemp-Booth Company. The next account, E. L. Brackett, represents a suit delivered April 9, 1929. The account of Dr. Cornelisen was for a suit made up from a memo goods of Ellison & Co. for which I paid them. I am not sure whose goods were used in making up the suit upon which the account of Asahel Curtis was based. The account of J. C. Dumett I would not be certain about until I had looked up the records, but the account being dated prior to the consignment contract could not have been based upon Kemp-Booth consigned goods, though the suit may have been made up from Kemp-Booth materials bought on open account and not paid for. The account of Duyree does not represent Kemp-Booth goods. It antedates the consignment contract and could not possibly be based upon Kemp-Booth consigned [85] goods. The A. G. England account was made up from Kemp-Booth consigned goods, so also was the next account, namely that of C. G. Evans.

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JAMES H. GARRETT,  
recalled,

testified that he had checked over the assigned ac-

(Testimony of James H. Garrett.)

counts during court intermission and had found that twelve of these accounts originated from suit patterns consigned by Kemp-Booth Company; that defendant's Exhibit A-11 sets out a list of assigned accounts, the name of the customer, the amount of the account, the total payment and the balance due on the account, together with the amount paid on those accounts identified as based on merchandise consigned by Kemp-Booth with the value of the cloth contained in the suit; that the total payments on each account is shown, but not the detail; that the schedule shows the pattern numbers which were furnished by the plaintiff. The last column totaling \$227.33 shows the value of the cloth in each suit on which any payment was received, except in the case of the Allen account upon which only \$5.00 was collected; that the list contains 35 consigned accounts, of which 12 are based upon woolens consigned by Kemp-Booth; that payments have been made upon nine of these accounts and the sum of \$444.50 collected thereon. Of the 12 accounts based on Kemp-Booth goods the cloth was worth \$227.23. On these 12 accounts \$444.50 was collected. On three of the accounts no collections have been made. That the face value of all the accounts assigned did not balance the amount due Kemp-Booth by \$129.73.

ARCHIE TAFT,

witness for the plaintiff, on

Direct Examination,

testified that he was employed by Seattle Broadcasting Company in 1930, 1931 and 1932; that he sold bankrupt advertis- [86] ing space on which the Broadcasting Company had a claim of \$285.00 and that the claim was subsequent to the date of the consignment contract.

Thereupon Mr. Riddell stipulated that there were subsequent creditors.

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JAMES O'CONNOR,

witness for the plaintiff, on

Direct Examination,

testified that he was agent for Metropolitan Building Company, owner of the store building leased to the bankrupt; that he was frequently at the bankrupt's store; that he did not know that the bankrupt held any goods on consignment from Kemp-Booth Company and never saw or heard of anything suggesting such a consignment. That when the goods were removed from the store there was \$2331.89 due on account of rent and services.

That thereupon it was stipulated that the Post Intelligencer handled advertising for the bankrupt during the period covered by the consignment contract and was without any knowledge of the consign-

(Testimony of James O'Connor.)

ment and has a claim against the bankrupt in the sum of \$647.13 and that the Seattle Times has a similar claim for \$463.20.

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J. L. GALVIN,

witness for the plaintiff, on

Direct Examination

testified:

That he was trustee for the bankrupt; that he had extended in red pencil the prices of suit patterns on Exhibit A attached to the interrogatories to the total value of \$2,478.34; that he had formerly been manager of Arnstein-Simon Co., a wholesale woolen house doing business at Seattle and San Francisco; that from 1914 to 1931 Arnstein Simon & Co. sold lots of goods on open account to the bankrupt and that in July 1930, there [87] was past due on this account and notes given for a total of approximately \$3,900.00; that at no time after July, 1930, did the bankrupt pay debts as they fell due; that Mr. Irving in October, 1930, gave witness a statement showing assets of \$44,942.00 and liabilities of \$18,229.00 and said that practically all of his accounts were past due. His woolen stock he gave as \$16,234.00. He did not mention that he held goods on consignment, nor did anything about his place of business so indicate; again in October, 1931, witness obtained a statement from Mr. Irving who said that



(Testimony of J. L. Galvin.)

his total indebtedness was then \$12,665.00 and that Kemp-Booth was on the list for \$1,762.00; that all assets of the bankrupt except a few accounts receivable have been reduced to cash, amounting to \$4751.82; that general claims total \$18,555.00; that a 4 per cent dividend has been paid and another 4 per cent dividend is probable.

On

Cross Examination,

the witness testified that about 120 suit patterns were recovered from various parties, some of which have been Kemp-Booth goods; that all woolens coming into the possession of the trustee were sold to the highest bidder under the direction of the Referee for the appraised value.

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## DEFENDANT'S TESTIMONY

JAMES H. GARRETT,

recalled, testified on

Direct Examination

for the defendant as follows:

That he has examined Exhibit A-12, being the list of woolens recovered by the trustee from Mr. Merrill of Longview and finds that all of the list consists of Kemp-Booth woolens. For the last three years at least Mr. Booth has been in Connecticut [88] and has been here only at intervals. All that time I have been in charge of Kemp-Booth Com-

(Testimony of James H. Garrett.)

pany on the coast. I did not know until long after the bankruptcy proceedings that the goods had been sent to Merrill for display. That plaintiff's Exhibit 1 is the Kemp-Booth ledger sheet of its account with the bankrupt. In July, 1930, at the time of the consignment contract, the bankrupt's open account showed a balance of \$485.00 for purchases from April 11, 1930, to July 18. Maturity on the items ranged from June 1 to September 1. Of the \$485.00, approximately \$127.00 was not yet due. Payment for the remainder had just matured. After the execution of the consignment agreement, the course of dealing was as follows: On July 31, we sold the bankrupt on open account \$229.60 of goods. Up to the time of the consignment contract the bankrupt's limit of credit with us was \$750.00. After the consignment contract we extended this credit limit to \$3,000.00. On August 31, the account for outright purchases amounted to \$746.00. On September 1, the first report of consignment sale was made amounting to \$153.00. On the same day we received payment in the sum of \$163.00, which involved a credit of \$10.00 on the old account. By October 7, purchases on open account totaled \$1,101.81. On this date the second consignment settlement was made with the charge of \$149.19 which was paid two days later and left the balance all on open account due from the bankrupt \$951.01. Open account items had increased to \$1028.00 on October 24, when \$218.67 was paid and credited on open ac-

(Testimony of James H. Garrett.)

count. There was no charge against the bankrupt for consigned merchandise at that time. No money was then due us for consigned merchandise. On November 4 a charge for consigned goods was made and later paid. On December 11, the open account stood at \$922.00, on which date there was no item owing for con- [89] signed merchandise. On December 31, we checked the consignment and entered a charge of \$80.43, which was paid in January. The open account then stood at \$1086.00. Similarly, check-ups of the consigned account were made on February 5, paid in March; April 17, paid by May; May 15, paid June 9; July 13 and September 17. On January 13, 1931, after receiving three trade acceptances of \$200.00 each, the balance due on open account stood at \$744.26. After the consignment contract business with the bankrupt on open account largely increased. He owed bills, but this was chronic. We learned of the failing condition of the bankrupt after the middle of January. The merchandise returned by the bankrupt on consignment account was when received worth approximately 50 per cent of the value originally memoed to the bankrupt. Prices had dropped materially. The value of the accounts received which were transferred to us was from 33 1/3 per cent to 45 per cent of the face value. The understanding regarding commissions with the bankrupt was that it should retain as its compensation the difference between sale prices and the cost of the materials, making and overhead. I do not know of any particular in which

(Testimony of James H. Garrett.)

the consignment contract was deliberately violated. We at all times tried to exact absolute compliance. Payments made by the bankrupt on open account and for consigned merchandise amount to \$2718.76; \$143.28 was allowed in discounts, of which all but \$23.03 was for discounts on consigned merchandise, because the open purchase accounts were not paid for within the discount period, where as the consignment accounts were paid for within the period allowing the discount. In the latter part of January Mr. Irving told Mr. Booth that he was pressed by creditors until he could not go further. I said that the consignment arrangement must be terminated and the unsold merchandise returned and settlement made for merchandise [90] used from the consignment. Mr. Irving said that he could not pay the latter, but had accounts receivable arising from the sale of our merchandise. We therefore insisted that he assign to us sufficient of these accounts to cover the debt owing, making it specific that we wanted only accounts arising from the sale of our own goods. I first learned that some of the assigned accounts did not arise from the sale of our merchandise yesterday in court. We had no means of checking up as the records were in the hands of the trustee.

On

Cross Examination,

the witness testified:

The 7 per cent discount is not the commission mentioned in the contract, but simply a discount for

(Testimony of James H. Garrett.)

cash payment. The net profit he made on a suit was to be the commission. We never paid him any commission; it was not contemplated. The patterns on display with Merrill were not charged to the bankrupt until May 31, 1933, after we had discovered what had become of them. Upon taking back the merchandise we did not credit the bankrupt with anything. No money values entered into the consignment account. Though we knew the assigned accounts were not worth over 33 1/3 per cent of their face, we credited the full amount to the bankrupt. We understood that when the consignment account was placed in Mr. Irving's store it belonged to us; that Irving might sell a suit cut from the goods and deliver the suit to his customer; that when the suit was so delivered to his customer we did not own the suit. We made no claim to the suit, but had a claim against him for the value of the goods. When we got back the 160 patterns we entered them in our stock cards. The merchandise taken back was not sold in one lump, but such part as we may have sold was sold by the piece. It will be impossible from our records to [91] trace the goods returned by the bankrupt.

By stipulation between counsel it was agreed that the 160 suit patterns returned to Kemp-Booth Company Limited within four months prior to the filing of the petition in bankruptcy were worth \$1652.23, which amount was 66 2/3 per cent of their original value.

(Testimony of James H. Garrett.)

Subsequent to the trial of this action, the defendant on November 3, 1934, in open court executed and delivered to the plaintiff a re-assignment of the uncollected balances of all accounts based upon suits made up from goods not supplied by the defendant. Three accounts for suits made up from goods supplied by the defendant were, however, not re-assigned.

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I, the undersigned, United States District Judge, do hereby CERTIFY that I presided at the trial of the above entitled cause; that the foregoing statement consisting of 41 pages, including the page upon which this certificate is executed, is hereby settled, allowed, and approved by me as a true, complete and properly prepared statement in condensed form of all of the evidence introduced at the trial of said cause.

Dated at Seattle, Washington, this 4th day of February, A. D. 1935.

EDWARD E. CUSHMAN,  
United States District Judge.

Copy received Jan. 22, 1935.

EARL G. RICE and  
McCLURE & McCLURE,  
Attorneys for Plaintiff.

[Endorsed]: Lodged Jan. 22, 1935.

[Endorsed]: Feb. 4, 1935. [92]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable Edward E. Cushman, District Judge of the United States District Court for the Western District of Washington, Northern Division:

The above named defendant feeling aggrieved by the decree made and entered in this cause on the 8th day of November, 1934, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors which is filed herein and prays that its appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, and desiring to supersede the execution of said decree, petitioner herein tenders bond in such amount as the court may require for such purpose and prays that with the allowance of the appeal a supersedeas be issued.

RIDDELL & BRACKETT,

Attorneys for Defendant. [93]

The foregoing petition is granted and appeal therein prayed for allowed and shall operate as a supersedeas upon the petitioner filing a bond in the sum of Five Thousand Dollars, with sufficient sureties to be conditioned as required by law.

Done at Tacoma, Wash., this 6th day of December, A. D. 1934.

EDWARD E. CUSHMAN,  
Judge United States District Court, Western District of Washington.

Copy received Dec. 3, 1934.

EARL G. RICE (Per W. E. McC)  
McCLURE & McCLURE,  
Attys. for Plaintiff.

[Endorsed]: Dec. 3, 1934. [94]

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[Title of Court and Cause.]

### ASSIGNMENT OF ERRORS.

Comes now the defendant and says that the decree entered in the above cause on the 8th day of November, 1934, is erroneous and unjust to the defendant for the following reasons, which the defendant assigns as error:

#### I.

The court erred in not finding that the goods delivered by the defendant to the bankrupt were delivered upon consignment only, title remaining at all times in the defendant.

#### II.

The court erred in holding that the delivery of the goods to the bankrupt by the defendant constituted a sale thereof and that the return of a part of said goods and the assignment of accounts and



the payment of cash to the defendant was not an accounting due to the defendant upon consigned goods, but a preference.

### III.

The court erred in refusing to find that the goods returned by the bankrupt to the defendant were goods belonging to the defendant; that they were in the possession of the bankrupt on consigned account only and that title to the same at [95] all times remained in the defendant.

### IV.

The court erred in refusing to find that accounts transferred by the bankrupt to the defendant were transferred pursuant to the requirements of a consignment contract, whereby title to the said goods and the proceeds thereof remained in the defendant and that the said transfer was not a preference, but was lawfully and properly made as an accounting of defendant's goods sold from consigned stock by the bankrupt.

### V.

The court erred in refusing to find that moneys paid by the bankrupt to the defendant were not paid as a preference, but were paid upon an accounting of the proceeds of goods owned by the defendant and held by the bankrupt on consignment only.

### VI.

The court erred in refusing to enter a decree dismissing the bill of the plaintiff.

WHEREFORE, defendant prays that said decree be reversed and an order be entered directing the dismissal of the bill of the plaintiff.

Dated at Seattle, Washington, this 3rd day of December, A. D. 1934.

RIDDELL & BRACKETT,  
Attorneys for Defendant.

Copy received Dec. 3, 1934.

EARL G. RICE (Per W. E. McC)  
McCLURE & McCLURE,  
Attys. for Plaintiff.

[Endorsed]: Dec. 3, 1934. [96]

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[Title of Court and Cause.]

APPEAL AND SUPERSEDEAS BOND.

Know All Men by These Presents :

That we, KEMP-BOOTH COMPANY, LTD., a corporation, as principal, and the Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto J. M. GALVIN, Trustee in Bankruptcy of the House of Irving, a corporation, bankrupt, in the full and just sum of FIVE THOUSAND DOLLARS, for the payment of which well and truly to be made we bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twelfth day of December, 1934.

WHEREAS, the above named KEMP-BOOTH COMPANY LTD., a corporation, is about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment entered in the above entitled action under date of November 8, 1934. Now, therefore, the condition of this obligation is such that if the above named Kemp Booth Company Ltd., a corporation, shall prosecute its appeal to effect, and answer all damages and cost if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue. [97]

[Seal]

KEMP-BOOTH COMPANY  
LIMITED,

By J. H. GARRETT,

Secretary-Treasurer.

[Seal]

FIDELITY AND DEPOSIT  
COMPANY OF MARYLAND,

By JAMES A. CATHCART,

Attorney in Fact.

Approved.

EDWARD E. CUSHMAN,

Dist. Judge.

State of Washington,  
County of King—ss.

On the Twelfth day of December, 1934, before me personally appeared J. A. Cathcart, to me known to be the Attorney in Fact of the Fidelity and Deposit Company of Maryland, the corporation that executed the within and foregoing instrument and acknowledged the said instrument to be the free and

voluntary act and deed of said corporation for the uses and purposes therein mentioned and on oath stated that he was authorized to execute said instrument and the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] CHARLES H. SHERIFF,  
Notary Public in and for the State of Wash-  
ington, residing at Seattle.

United States of America,  
State of Washington,  
County of King—ss.

On this 12th day of December, A. D. 1934, before me personally appeared J. H. GARRETT, to me known to be the secretary-treasurer of KEMP-BOOTH COMPANY, LIMITED, the corporation that executed the within and foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes there- [98] in mentioned and on oath stated that he was authorized to execute said instrument and that the seal affixed thereto is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] S. M. BRACKETT,  
Notary Public in and for the State of Washington,  
residing at Seattle.

[Endorsed]: Filed Dec. 13, 1934.

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR FILING  
RECORD ON APPEAL.

Citation on appeal having been signed and entered herein on the 6th day of December, 1934, and it being impossible to procure the settlement and approval of the evidence herein prior to the return date named in the said citation, good cause having been shown and upon stipulation of counsel hereto appended, it is

ORDERED that the time within which Kemp-Booth Company Limited, a corporation, appellant herein, may file the record in this cause with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be and the same is hereby extended to the 18th day of Feby., 1935.

Dated at Tacoma, Washington, this 2nd day of January, A. D. 1935.

EDWARD E. CUSHMAN,

Judge United States District Court for the Western  
District of Washington.

[Endorsed]: Filed Jan. 2, 1935. [99]

## STIPULATION.

IT IS HEREBY STIPULATED by and between the parties hereto that the foregoing order may be entered.

EARL G. RICE (W. E. McC)  
McCLURE & McCLURE,

Attorneys for J. M. Galvin, as Trustee in  
Bankruptcy of the House of Irving, a  
corporation, bankrupt.

RIDDELL & BRACKETT,

Attorneys for Kemp-Booth Company  
Limited, a corporation.

[Endorsed]: Filed Jan. 2, 1935. [100]

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[Title of Court and Cause.]

## PRAECIPE.

TO THE CLERK OF THE ABOVE ENTITLED  
COURT:

PLEASE CERTIFY to the United States Circuit of Appeals for the Ninth Circuit transcript of the following pleadings and papers:

1. Bill of Complaint.
2. Answer.
3. Court's Memorandum Decision of April 7, 1934.
4. Findings of Fact and Conclusions of Law entered, except the contract set out in paragraph 13 thereof, in place of which contract there shall appear the notation, "Here is set out the contract of July 26, 1930, copy of which appears in the

Court's memorandum decision of April 7, 1934, supra."

5. Supplemental Finding of Fact No. 1 entered.

6. Supplemental Finding of Fact No. 2, entered.

7. Defendant's Proposed Findings of Fact and Conclusions of Law, except the contract which appears in paragraph 8 thereof, in place of which contract there shall appear the notation, "Here is set out the contract of July 26, 1930, copy of which appears in the Court's memorandum decision of April 7, 1934, supra."

8. Defendant's Exceptions to Findings of Fact and Conclusions of Law entered and exceptions to Court's refusal to enter Defendant's Findings and Conclusions.

9. Decree entered November 8, 1934.

10. Defendant's exception to decree.

11. Statement of the Evidence (when settled and certified).

12. Petition for Appeal.

13. Order on same.

14. Assignments of Error.

15. Citation.

16. Bond.

RIDDELL & BRACKETT,

Attorneys for Defendant.

Copy recd.

EARL G. RICE, 12/21/34.

EWf

[Endorsed]: Filed Dec. 21, 1934. [101]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO TRANSCRIPT OF RECORD.

United States of America,  
Western District of Washington,—ss.

I, EDGAR M. LAKIN, Clerk of the above entitled court do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 101, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of the said District Court at Seattle, and that the same constitute the record on appeal herein from the decree of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit: [102]

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 253 folios at 15¢	\$37.95
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record	.50
Total	\$43.45



I hereby certify that the above cost for preparing and certifying record, amounting to \$43.45 has been paid to me by the attorneys for the appellant.

I further certify that I attach hereto and transmit herewith the original citation on appeal issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 6th day of February, 1935.

[Seal]

EDGAR M. LAKIN,

Clerk United States District Court for the Western District of Washington,

By TRUMAN EGGER,

Deputy. [103]

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[Title of Court and Cause.]

CITATION ON APPEAL.

UNITED STATES OF AMERICA TO J. M. GALVIN, as Trustee in Bankruptcy of the House of Irving, Bankrupt, and to EARL G. RICE, Esquire, and MESSRS. McCLURE & McCLURE, his attorneys:

YOU AND EACH OF YOU ARE NOTIFIED that in a certain case in equity in the United States District Court for the Western District of Washington, cause No. 939, wherein J. M. Galvin, as trustee in Bankruptcy of the House of Irving, a corporation, bankrupt, is plaintiff, and Kemp-Booth Company Limited, a corporation, is defendant, an appeal has been allowed the defendant therein to

the United States Circuit Court of Appeals for the Ninth Circuit.

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in said court at San Francisco, California, thirty days after the date of this citation to show cause if any there be why the decree appealed from should not be corrected and speedy justice be done to the parties in that behalf.

DATED at Tacoma, Washington, this 6th day of December, A. D. 1934.

[Seal]                      EDWARD E. CUSHMAN,  
Judge United States District Court, Western  
District of Washington.

Copy received Dec. 6, 1934.

EARL G. RICE,  
McCLURE & McCLURE,  
Attys. for Pltff. [104]

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[Endorsed]: No. 7768. United States Circuit Court of Appeals for the Ninth Circuit. Kemp-Booth Company, Limited, a Corporation, Appellant, vs. J. M. Galvin, as Trustee in Bankruptcy of the House of Irving, a corporation, bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed February 8, 1935.

PAUL P. O'BRIEN  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.